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No. 01-

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IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILWAY CO.,
Petitioner,

v.

TAMERA LEE KAPITAN, Special Administratrix
of the Estate of RUDOLPH J. KAPITAN,
Respondent.

On Petition for a Writ of Certiorari to the Indiana Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), require summary reversal of a state court holding that state inadequate-device tort law claims are not pre-empted under the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106, despite the presence of installed federally funded warning devices at the railway crossing at the time of the accident?

2. Whether the state court erred in holding, in conflict with the United States Court of Appeals for the Tenth Circuit, that pre-emption is inappropriate when certain additional federally funded warning devices were not fully installed and operating at the time of the accident?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Richard Enos, the train conductor, was a defendant but not an appellant below.[1]

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it is a wholly owned subsidiary of the Canadian National Railway. Petitioner further states that no publicly traded company owns ten percent or more of the stock of Canadian National Railway.

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[1] The trial court entered judgment for Defendant Richard Enos on February 2, 2000.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Grand Trunk Western Railway Company ("Grand Trunk") respectfully petitions for a writ of certiorari to review the judgment of the Indiana Court of Appeals in this case.

OPINIONS BELOW

The judgment of the Indiana Court of Appeals was entered on April 6, 2001, and is not reported. Pet. App. 3a-17a. The order denying the petition for rehearing was entered on June 6, 2001, and is not reported. The order of the Indiana Supreme Court denying the petition for transfer was entered on November 14, 2001, and is not reported. Pet. App. 1a-2a. The order of the Circuit Court granting in part and denying in part petitioner's motion for summary judgment was entered on July 13, 1995, and is not reported. Pet. App. 22a-30a. The order of the Indiana Court of Appeals on an interlocutory appeal reversing the trial court's grant of partial summary judgment was entered on April 11, 1997, and is not reported. Pet. App. 18a-21a.

JURISDICTION

The opinion of the Indiana Court of Appeals was entered on April 6, 2001. The Indiana Supreme Court denied Grand Trunk's petition for transfer on November 14, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutes at issue in this case are 23 U.S.C. §§ 109(e), 130, and 409 and 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434) and are reprinted in Pet. App. 31a-37a. The

regulations at issue in this case are 23 C.F.R. §§ 646.214 and 646.216; they are reprinted in Pet. App. 38a-46a.[1]

STATEMENT OF THE CASE

In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), this Court elucidated the standards for federal pre-emption of state tort law claims alleging that a railroad failed to install adequate warning devices at highway-railroad crossings. This Court held that pre-emption is mandated by the Federal Railroad Safety Act of 1970 ("FRSA") for any project where federal-aid funds participate in the installation of warning devices. *Easterwood*, 507 U.S. at 670; *Shanklin*, 529 U.S. at 352-54; 23 C.F.R. § 646.214(b)(3) & (4).

In this case the Indiana Court of Appeals allowed a state negligence claim despite the installation of certain federally funded devices at a highway-railroad crossing. This holding is in direct conflict with *Easterwood* and *Shanklin* and requires summary reversal. The Indiana Court of Appeals denied pre-emption because certain additional federally funded warning devices were not yet fully installed and operating at the time of the accident, Pet. App. 9a-10a, but under *Shanklin*'s holding, that fact is immaterial to pre-emption analysis. For any crossing with federally funded devices, federal law dictates the standards for determining what devices are adequate, and displaces any independent duty of care that the railroad may have had under state law. *Shanklin*, 529 U.S. at 353.

Even if summary reversal were not appropriate, this Court should resolve the substantial conflict in the circuits over what constitutes the "installation" of federally funded

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[1] The regulations are reproduced from the 2001 edition of the Code of Federal Regulations. The regulations have not changed substantively since the time of the accident.

warning devices that triggers FRSA pre-emption. The Indiana Court of Appeals, in delaying pre-emption until the end of the project, joined several federal courts of appeals in a conflict with the United States Court of Appeals for the Tenth Circuit, which has determined that pre-emption is triggered at the beginning of a project, when the decisionmaking authority of the railroad ends. The resulting patchwork of standards for federally funded railroad crossings undermines the "[n]ational uniformity" sought by Congress in enacting the FRSA, see 49 U.S.C. § 20106. This Court should grant certiorari in order to resolve the conflict and to promote the statutory goal of uniformity in the area of railroad safety.

A. Statutory And Regulatory Background

The safety of public railway-highway grade crossings has long been a matter of federal concern.[2] From the inception of the federal-aid highway program, Act of July 11, 1916, ch. 241, 39 Stat. 355, Congress authorized federal funds for States to use in improving those crossings. From as early as 1936, see Act of June 16, 1936, ch. 582, § 8, 49 Stat. 1519, 1521, Congress has forbidden expenditure of federal funds on any portion of federal-aid or other designated highways "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing." 23 U.S.C. § 109(e).[3]

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[2] A "public grade crossing" is an intersection of a railway and a public road at the same level. Federal R.R. & Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Solving the Problem* 2 (1972) ("*1972 Crossings Report*").

[3] Such provisions served not only to protect motor vehicle drivers and passengers, but also the railroads and their passengers: "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation.' *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 422-23 (1935) (footnote omitted) (discussing grade crossings); *see also Prevention of Rail-Highway Grade-Crossing*

In 1970, Congress, troubled by the inadequacy of haphazard state regulation of railroad safety,[4] enacted the FRSA, Pub. L. No. 91-458, 84 Stat. 971.[5] The purpose of the FRSA was "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress vested the Secretary of Transportation with broad powers to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a); *Shanklin*, 529 U.S. at 347. In the FRSA's pre-emption provision, Congress unequivocally declared its intent that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Accordingly, it only permitted States to "adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.*; *Shanklin*, 529 U.S. at 347-48.

Accidents Involving Ry. Trains & Motor Vehicles, 322 I.C.C. 1, 82 (1964) ("In the past it was the railroad's responsibility for protection of the public at grade crossings. . . . Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.").

[4] *See* H.R. Rep. No. 91-1194, at 11 (1970) (expressing disbelief that "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

[5] The FRSA was originally codified at 45 U.S.C. §§ 421 to 447. As part of a broad reorganization of federal transportation laws, Congress formally repealed the FRSA in 1994 and re-enacted its substantive provisions for codification in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Congress made clear that the repeal and re-enactment were not intended to make any substantive change in the FRSA provisions, other than minor alterations in form or language. *See id.* § 6(a), 108 Stat. at 1378; H.R. Rep. No. 103-180, at 1-5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-22.

In 1972, the Secretary of Transportation submitted a statutorily-mandated study of the grade crossing program.[6] He reported that "the current division of responsibility and authority among the private and public interests involved at the State and local level result[ed] in a fragmented approach to grade crossing safety," and he called for new "national coordination of [the] issue." *1972 Crossings Report* at 34. The Secretary recommended that Congress focus its funding efforts on installing protective devices rather than eliminating grade crossings altogether. *Id.* at 91. Although active warning systems, which are expensive, were not warranted at most crossings,[7] the Secretary underscored the universal importance of passive warnings by recommending that "each railroad and each public agency which does not now have a program for passive device improvement should undertake one immediately." *Id.* at 92. Observing that crossing dangers were not limited to the traditional federal-aid highway system, the Secretary called for expansion of federal funding to all public roads in a State. *Id.* at iii, 14, 92. Finally, the Secretary recommended that the Federal Highway Administration ("FHWA") administer assistance at the federal level, but that the "State highway departments, in cooperation with political subdivisions," have primary

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[6] Section 433 of FRSA, in addition to requiring the Secretary to undertake solutions to the grade crossing problem pursuant to his authority under existing law, mandated that the Secretary submit to the President for transmittal to Congress a comprehensive study of the grade crossing program, together with his recommendations for eliminating and protecting railroad crossings. 45 U.S.C. § 433 (repealed 1994).

[7] "Active warning devices" include automatic gates and flashing lights that are activated by the approach of a train. "Passive warning devices" are devices such as signs and pavement markings that do not change when a train approaches. 23 C.F.R. § 646.204. The costs of active devices at each crossing were reported to range (in 1972 dollars) from $17,000 to $30,000 for installation, and $800 to $1,400 for annual maintenance. *1972 Crossings Report* at 77.

responsibility for developing programs for crossing safety. *Id.* at 92.

In response to the Secretary's report, Congress enacted section 203 of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, 283.[8] This statute specifically grants States federal funds "for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a). To secure funds, States must "conduct and systematically maintain a survey of all highways" to identify crossings in need of safety improvements, and must "establish and implement a schedule of projects for this purpose." *Id.* § 130(d). The regulatory scheme is known as the Section 130 Crossing Program.

This federal approach to crossing hazards has been a resounding success. Even though highway and rail traffic has increased, the Section 130 program has contributed to a precipitous decline in the number of crossing accidents and fatalities: there were more than 12,000 accidents and 1,500 fatalities at railway crossings in 1972, and only about 3,502 accidents and 425 fatalities in 2000. U.S. Dep't of Transp., *Accidents That Shouldn't Happen: A Report of the Grade Crossing Safety Task Force to Secretary Federico Pena* 2 (1996); Federal R.R. Admin., U.S. Dep't of Transp., *Railroad Safety Statistics Annual Report 2000*, at 4 tbl.1-1 (2001).

The Section 130 program was implemented through regulations promulgated by the FHWA.[9] These regulations govern state programs for evaluating railway crossing hazards and developing remedial projects. See 23 C.F.R. pt. 924. The FHWA also made States "subject to further regulations

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[8] Congress repealed section 203 of the 1973 Highway Safety Act and re-enacted its provisions (with minor substantive changes not relevant here) as amendments to 23 U.S.C. § 130 in section 121 of the Surface Transportation Act of 1987, Pub. L. No. 100-17, § 121, 101 Stat. 132, 159-60.

[9] The Secretary delegated his statutory power to administer the Acts to the FHWA. *See* 49 C.F.R. § 1.48(b), (c)(2).

governing the use of particular warning devices." *Easterwood*, 507 U.S. at 666. Among those specific regulations is a rule prescribing what will constitute "[a]dequate warning devices" where "[f]ederal-aid funds participate in the installation of the devices" at rail-highway crossings. 23 C.F.R. § 646.214(b)(3). Specifically, 23 C.F.R. § 646.214(b)(3) lists the hazard conditions that require the installation of automatic gates and flashers. For those crossings that do not reflect the hazards listed in (b)(3), the type of warning device to be installed is "subject to the approval of FHWA." *Id.* § 646.214(b)(4). These regulations are at the heart of this case.

B. This Court's Decisions In *CSX Transportation, Inc.* v. *Easterwood* And *Norfolk Southern Railway* v. *Shanklin*

In *CSX Transportation, Inc.* v. *Easterwood*, this Court declared that the federal regulations defining "[a]dequate warning devices" in 23 C.F.R. § 646.214(b)(3) and (4) "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." 507 U.S. at 670.

This Court accordingly stated a bright-line test for federal pre-emption:

> In short, *for projects in which federal funds participate in the installation of warning devices*, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The . . . regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Id. at 671 (emphasis added). Simply stated, "when [§ 646.214(b)(3) and (4)] are applicable, state tort law is pre-empted." *Id.* at 670. The *Easterwood* Court found no pre-

emption in that case because the regulations did not apply. No federal funds had "participated" in the installation of warning devices since the plan for upgrading a crossing was "shelved and the funds allocated for use in another project." *Id.* at 672.

The lower courts nevertheless could not agree on how to apply the *Easterwood* bright-line rule, so this Court clarified the rule in *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000). In *Shanklin*, federal funds had participated in the installation of passive warning devices, but the lower court had determined that the plaintiff's inadequate warning device claim was not pre-empted by sections 646.214(b)(3) and (4). It declined to read *Easterwood* "literally" and decided that in the case of passive devices, there would be no pre-emption unless the FRSA made an individualized determination of the adequacy of the devices at the crossing. *Shanklin* v. *Norfolk S. Ry.* 173 F.3d 386, 392, 394, 397 (6th Cir. 1999). This Court reversed, concluding that pre-emption of relevant state tort law claims is not limited to active devices or dependent on individualized federal findings. Instead, pre-emption occurs, as *Easterwood* held, when federal funds have participated in the installation of *any* warning devices. *Shanklin*, 529 U.S. at 353.

This Court also rejected the claim that the State's failure to install a warning device required by the federal regulations precluded pre-emption. The respondent had argued that conditions at the crossing necessitated automatic gates and lights under 23 C.F.R. § 646.214(b)(3), and pavement markings were also required under subsection (b)(1). The Court found these arguments to be irrelevant to the pre-emption analysis, since it is the "displacement of state law concerning the devices' adequacy . . . that pre-empts state tort actions." *Shanklin*, 529 U.S. at 357-58.

Shanklin was careful to point out that once pre-emption attaches, it is not to be turned off and on like a water faucet, depending on future events: "[w]hether the State should have

originally installed different or additional devices, or whether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question." *Id.* at 358.

C. Statement Of Facts

On November 6, 1988, a Grand Trunk train was traveling west as it approached a crossing at Hendricks Street in Merrillville, Indiana. Richard Kapitan was driving a car towards the railroad tracks at the same time. He was speeding and ran a stop sign at the tracks; the train and the car collided, and Kapitan died as a result of the collision.

On the date of the accident, the crossing was equipped with two 30-inch "Stop" signs (one for each side), two "Stop Ahead" signs, two "Railroad Crossing" ("crossbucks") signs with "2 Tracks" warnings, and railroad crossing markings on the pavement. These signs were installed as part of an FHWA-approved and -funded upgrade program for the grade crossing. The FHWA had approved the project on August 1, 1988, and committed federal funds to pay for the upgrade, which was also scheduled to include automatic gates and flashers that were not up at the time of the accident.

The crossing had been closed for the beginning of construction on October 3, 1988. The state highway contractor regraded the approach to eliminate a "humped" configuration, repaved the roadway, and installed the pavement markings. Merrillville's street department installed two new "Stop Ahead" signs, two "2 Tracks" signs, two "Stop" signs, and reinstalled the crossbucks. Grand Trunk poured foundations for gates and flashers. The crossing was reopened by Merrillville in early November, just days before the accident in this case. On December 1, 1988, after the accident, the gates and flashers were installed.

D. This Litigation

Kapitan's estate filed suit against the Grand Trunk Western Railway Company and its train conductor on December 2, 1989. The suit alleged various tort claims, including a claim that Grand Trunk was negligent in failing to install adequate warning devices at the Hendricks Street crossing.

Defendants denied any negligence in their answer, and on November 28, 1994, they moved for partial summary judgment on the claim of insufficient warning devices, arguing that the claim was pre-empted by federal law. On July 13, 1995, the trial court agreed and granted partial summary judgment, finding that the claim was a "state law claim . . . preempted by federal law, and therefore said claim must fail." Pet. App. 29a.

Plaintiff sought an interlocutory appeal, arguing that the partial summary judgment eliminated her ability to prevail at trial and recover damages in the case. On April 11, 1997, the Indiana Court of Appeals reversed the trial court's decision on pre-emption. It wrote that "[b]ecause the federally approved warning devices were not yet operational at the time of Kapitan's accident, preemption had not occurred as of the accident, and summary judgment must be reversed on this issue." Pet. App. 20a.

A jury trial was scheduled for January 31, 2000. The trial court rejected Grand Trunk's motion for a continuance pending this Court's decision in *Shanklin*. On February 3, 2000, the jury returned a verdict finding Kapitan 60 percent at fault, but nonetheless awarding his estate damages. Because the jury had been instructed that no damages could be awarded if Kapitan was more than 50 percent at fault, the trial court returned the case to the jury to rectify the verdict. The jury returned an amended verdict that Kapitan was 50 percent at fault, and awarded Kapitan's estate $2,554,740.00 in damages. Grand Trunk appealed to the Indiana Court of Appeals.

E. Decision Of The Indiana Court Of Appeals

A central issue before the Indiana Court of Appeals was the federal pre-emption of the inadequate warning device claim. The trial court had *found as an uncontested fact that federal funds had participated in the installation of the stop signs and pavement markings at the Hendricks Street crossing*. C.A. App. 214-15 ("On August 1, 1988, the Federal Highway Administration approved the Hendricks Street crossing upgrade project, obligating federal funds to pay for the project.") Despite this undisputed evidence, as well as this Court's intervening decision in *Shanklin*, the Indiana Court of Appeals affirmed the jury's verdict on April 6, 2001. The court rejected Grand Trunk's federal pre-emption claim by quoting its earlier interlocutory decision:

> In our previous unpublished decision of *Kapitan v. Grand Trunk Western Railway Co.*, No. 37C01-9004-CT-88, slip op. at 3 (Ind. Ct. App. 1997) we held that "[b]ecause the federally approved warning devices were *not yet operational* at the time of Kapitan's accident, preemption had not occurred as of the accident, and summary judgment must be reversed on this issue." (Emphasis added.) This language is consistent with the Supreme Court's opinion in *Shanklin*. Accordingly, we affirm our previous ruling that Kapitan's state tort claim was not preempted by federal regulations.

Pet. App. 9a-10a. The court simply ignored the fact that there were federally funded (and fully installed) warning devices at the crossing at the time of the accident.

Grand Trunk filed a timely petition for rehearing on the ground that the Indiana Court of Appeals' pre-emption analysis conflicted with this Court's decision *Shanklin*. On June 6, 2001, the Indiana Court of Appeals denied the petition without comment. Grand Trunk then filed a timely petition for transfer to the Indiana Supreme Court, which rejected the petition without comment on November 14, 2001.

REASONS FOR GRANTING THE PETITION

This case involves a state court's blatant disregard for a recent decision of this Court on an important issue of federal law. *Shanklin* established that when a crossing upgrade project receives federal approval and funding, and federally funded warning devices have been installed, any independent state-law duty of care a railroad may have had regarding the warning devices is pre-empted. In this case, the Indiana Court of Appeals allowed a state-law claim for negligence after federally funded passive warning devices had been installed. This Court should grant summary reversal in light of *Shanklin*.

In the alternative, if this Court declines to summarily reverse the decision below, it should grant certiorari in this case to resolve a mature circuit split on the question of what constitutes "installation" for the purpose of pre-emption timing where an accident occurs during an ongoing federally funded project for the installation of active devices. The decision of the Indiana Court of Appeals follows several federal courts of appeals in a direct conflict with the Court of Appeals for the Tenth Circuit, which holds that pre-emption occurs at the beginning of the project, when federal funds are committed to the installation of warning devices.

The consequences of this split are significant. It makes the responsibilities of the railroad and the federal and state governments vary depending on the jurisdiction where an accident occurs and thus undermines Congress's express goal of promoting the standardization of railroad safety regulations. See 49 U.S.C. § 20106. The generally strong interest in upholding both congressional intent and the supremacy of federal law coincides with the policy interest in ensuring that the law covering the safety of federally funded grade crossings be uniform. This Court should grant certiorari in order to correct the misapplication of its

Easterwood and *Shanklin* precedents and to resolve the conflict among the circuits.

I. THE DECISION OF THE INDIANA COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *EASTERWOOD* AND *SHANKLIN*.

The FRSA established that States may only regulate railroad safety until there is a federal law or regulation that "cover[s] the subject matter of the State requirement." 49 U.S.C. § 20106. At that point, state law is pre-empted. This displacement follows from the principle of the Supremacy Clause of the United States Constitution, providing that the Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

The FHWA promulgated federal regulations determining the appropriate warning measures at grade crossings when federal funds are used for a crossing upgrade. These federal regulations, 23 C.F.R. § 646.214(b)(3) and (4), which govern the choice of warning devices, "cover" the same subject matter as state negligence law on the adequacy of grade crossing warning devices. *Easterwood*, 507 U.S. at 671. This Court therefore held that when these regulations apply, state-law negligence claims against the railroad based on inadequate warning devices fail. *Id.* at 670; *Shanklin*, 529 U.S. at 357.

Specifically, *Shanklin* reasserted the lesson from *Easterwood* that "§§ 646.214(b)(3) and (4) pre-empt state tort claims concerning the adequacy of *all* warning devices installed with the participation of federal funds." *Shanklin*, 529 U.S. at 357. As this Court explained:

> When the FHWA approves a crossing improvement project and the State installs the warning devices using

> federal funds, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject. At that point, the regulation dictates "the devices to be installed and the means by which railroads are to participate in their selection."

Id. (quoting *Easterwood*, 507 U.S. at 671). As a consequence, "[w]hat states cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." *Id.* at 358.

In this case, the regulations applied, and passive warning devices were installed; plaintiff's state-law claim based on the warning devices therefore fails. The reason plaintiff no longer has a claim under state law is simple: plaintiff's claim rests on the assertion that *at the time of the accident*, the railroad owed the public a duty of care to provide adequate warning of the presence of a crossing by using various state warning devices. At the time of the accident, however, federal law had stepped in to determine what devices were necessary and to fund such devices. Once the State had accepted the federally funded passive warning devices, it could no longer impose an ongoing duty upon the railroad to determine the appropriate devices. Plaintiff cannot make a claim against the railroad for the breach of a duty of care when the railroad's state-law duty had been extinguished.

It is immaterial to the pre-emption analysis whether the federal project also calls for additional warning devices. *Shanklin* considered and rejected a similar claim: Plaintiff Shanklin argued that pre-emption did not apply in her case because at the time of the accident, pavement markings that were required by federal regulation (and thus were a mandatory requirement of the FHWA-approved project) did not exist. See 23 C.F.R. § 646.214(b)(1) (incorporating requirements of the U.S. Department of Transportation's *Manual on Uniform Traffic Control Devices for Streets and*

Highways ("MUTCD")); *id.* § 630.106(a) (requiring that a federal-aid project comply with all applicable regulations and laws). Plaintiff also argued that flashers and gates were necessary under section 646.214(b)(3) because there were extrahazardous factors present at the site.[10] *Shanklin*, 529 U.S. at 357. The *Shanklin* Court rejected these arguments as "misconce[ptions] [of] how pre-emption operates": it is the shift in decisionmaking authority that is the key to the pre-emption question. When the federal regulations apply, "[i]t is this displacement of state law concerning the devices' adequacy, and not the State's or the FHWA's adherence to the standard set out in §§ 646.214(b)(3) and (4) or to the requirements of the MUTCD, that pre-empts state tort actions." *Id.* at 357-58.[11]

Thus, even if the court below were correct that federally funded devices must be installed and operating for pre-emption to occur, but see *infra*, its judgment must be reversed. In the instant case, passive warning devices were installed with federal funds and were operational, as in *Shanklin*. The same regulations that triggered pre-emption in *Shanklin* apply in this case. The *Shanklin* Court rejected the same kind of argument plaintiff here makes about the absence

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[10] *Easterwood* noted that 23 C.F.R. § 646.214(b)(1) does not have a pre-emptive effect, although (b)(3) does where it applies. 507 U.S. at 669-70.

[11] The same logic underlies court decisions holding that later federal determinations requiring more warning devices at a crossing do not cancel the federal pre-emption that arose during an earlier federally funded passive device installation. *See Bock* v. *St. Louis Southwestern Ry.*, 181 F.3d 920 (8th Cir. 1999) (finding pre-emption when federal funds had been used to install crossbucks, even though at the time of the accident there had been no implementation of a later federal determination that the site should have lights and automatic gates), *cert. denied*, 529 U.S. 1086 (2000); *Powers* v. *CSX Transp., Inc.*, 97 F. Supp. 2d 1297 (S.D. Ala. 2000) (same). These holdings are in conflict with the instant case in that *Bock* and *Powers* do not require all federally mandated warning devices to be in place and operating in order for pre-emption to occur.

of some required devices, and it recognized that pre-emption had occurred. The Indiana Court of Appeals' decision was not faithful to this Court's teaching. Instead the court of appeals squarely held that a federally funded warning device installation that required pre-emption in *Shanklin* did not effect pre-emption in this case. This Court should grant certiorari to summarily reverse in light of *Shanklin*.

II. THE DECISION OF THE INDIANA COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE TENTH CIRCUIT AND THUS UNDERMINES THE FEDERAL POLICY OF UNIFORMITY IN RAILROAD SAFETY.

The lower court's holding that pre-emption is not triggered until the last of the mandated warning devices is functioning directly conflicts with the law in the Tenth Circuit, which locates the pre-emption trigger earlier in the process, when significant federal resources are committed. See *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996); *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559 (10th Cir. 1995). The key for the Tenth Circuit in determining when federal funds "participate in the installation" is "'the actual expenditure of federal resources of more than a casual or de minimis nature, and specifically directed toward the ultimate installation of the improved warning devices.'" *Armijo*, 87 F.3d at 1190 (quoting *Hatfield*, 64 F.3d at 562). That is the moment when the federal government commences "installation" of the warning devices and the crossing is federalized. Pre-emption therefore occurs at the beginning rather than the end of a crossing upgrade project. See *id.*; *Hatfield*, 64 F.3d at 562.

In contrast, the Indiana Court of Appeals and several federal courts of appeals, along with a state supreme court, have avoided federally mandated pre-emption until the last of the mandated warning devices has been installed. See *Thiele* v. *Norfolk & W. Ry.*, 68 F.3d 179 (7th Cir. 1995) (rejecting the argument that pre-emption occurred when the railroad had

dug holes and set posts for gates and flashers, which were not operational at the time of the accident; existing stop signs and crossbucks were not federally funded); *Waymire* v. *Norfolk & W. Ry.*, 218 F.3d 773, 776-77 (7th Cir. 2000) (reiterating *Thiele*'s standard for crossing device claim pre-emption after *Shanklin* in a FELA case), *cert. denied*, 531 U.S. 1112 (2001); *St. Louis Southwestern Ry.* v. *Malone Freight Lines, Inc.*, 39 F.3d 864, 867 (8th Cir. 1994) (finding pre-emption when "all the devices prescribed in the FHA-approved upgrade plan are installed and operating"; rejecting a claim that installation of larger flasher lenses qualified as the installation of a warning device as defined in the federal regulations); *Earwood* v. *Norfolk S. Ry.*, 845 F. Supp. 880, 886 (N.D. Ga. 1993) (rejecting the argument that the use of federal funds in prioritization, planning, and contracting prior to an engineering study or installation was sufficient for pre-emption); *Akin* v. *Missouri Pac. R.R.*, 977 P.2d 1040, 1052-53 (Okla. 1998) (rejecting the Tenth Circuit's holding that the commitment of federal resources is sufficient for pre-emption; stating that pre-emption does not occur until federally funded devices are operational).

Under these contradictory cases, pre-emption has been variably determined to occur at the moment when federal funds go to a preliminary engineering study, *Hatfield*, 64 F.3d at 562, or at the moment when the last of the mandatory warning devices is installed, *Malone*, 39 F.3d at 867. The tests have ranged from the expenditure of more than minimal federal funds, *Hatfield*, 64 F.3d at 562, to full compliance with all regulations, *Kapitan*, Pet. App. 9a-10a; see also *Michael* v. *Norfolk S. Ry.*, 74 F.3d 271, 273 (11th Cir. 1996) (stating that if a federally funded automatic gate arm's length did not comply with federal regulations, there would be no pre-emption on claims for negligent failure to warn of defective devices or negligent maintenance, construction, or design).

The Tenth Circuit's ruling concerning the trigger for pre-emption reflects the plain language of the regulations, which specifies when pre-emption occurs: the adequacy of warning devices is federally determined under the regulations when "[f]ederal-aid funds *participate in the installation* of the devices." 23 C.F.R. § 646.214(b)(3) (emphasis added). The regulations do *not* include plaintiff's test that the devices must be "installed and operating." "Installation" in the regulations at issue here has the meaning of "[t]he act of installing," rather than "[t]he state of being installed." See *American Heritage College Dictionary* 704 (3d ed. 1997). This understanding is bolstered by two common-sense bases for construing the regulation. First, federal funds do not "participate" in the state of installation. Rather, federal funds "participate" in the act of installing devices, in the sense that they pay for the engineering and construction work to install warning devices. Second, the term "installation" is used similarly in the progressive (rather than the perfective) sense elsewhere in the regulations on highway or railroad projects. See, *e.g.*, 23 C.F.R. § 646.216(d)(3)(i) (allowing lump-sum payment for "[i]nstallation or improvement of grade crossing warning devices"); *id.* § 645.205(c) ("manner of installation"). Plaintiff would prefer that the warning devices be "installed and operating" before federal law determines the adequacy of the crossing, but this is not what the regulations say. The regulations require that the project be in progress—not that it be complete—for pre-emption to occur. Courts have no reason to disregard the plain language of the regulations, which defines the moment of pre-emption.

There can be no doubt that, under the plain language of the regulations, in this case pre-emption occurred because the installation was underway. Federal funds "participate," within the meaning of 23 C.F.R. § 646.214(b)(3), in the State's cost of the project as a whole on a 90/10 basis, *id.* § 646.212(b)(3), as long as the device installation was within the course of the project and the costs were reimbursable

under the federal regulations. *Id.* § 140.904(a). All the warning devices were part of the federally approved project and reimbursable as such, and the installation of the passive devices was complete and the installation of the active devices was underway. Accordingly, federal funds were participating in the installation of the warning devices at the time of the accident. In summary, state-law claims based on the adequacy of the devices were pre-empted.

Only this approach to pre-emption accords with the logic of *Easterwood* and *Shanklin*, which explained that the key to pre-emption is the federalization of the crossing, not the particulars of the warning devices or their functioning. It simply makes no sense to hold, in a project governed by federal pre-emption law that sets the standard for the *selection* of warning devices, that pre-emption of state law regarding the *selection* of warning devices does not occur until after the devices are actually "installed and operating."

As the Tenth Circuit, interpreting this Court's *Easterwood* precedent, has explained, once the federal government is involved, the railroad can no longer make decisions on the adequacy of the warning measures. Therefore pre-emption logically occurs at the beginning, rather than the end, of a federally funded grade crossing improvement:

> The fundamental issue under both *Easterwood* and our post-*Easterwood* decisions is whether the federal government has "displace[d] state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained" and "effectively set the terms under which railroads are to participate in the improvement of crossings." *Easterwood*, 507 U.S. at 670 . . . . [T]he issue is not *what* warning system the federal government determines to be necessary, but whether the *final authority to decide* what warning system is needed has been taken out of the railroad's and the state's hands under 23 C.F.R. § 646.214(b)(3) & (4).

Armijo, 87 F.3d at 1192 (citation omitted) (alteration in original). To adopt an "installed and operating" rule would saddle railroads with liability for decisions that they can no longer make because of the federal regulations.

Despite the illogic of its "installed and operating" rule, the Indiana Court of Appeals did cite language to that effect in *Shanklin*:

> "[O]nce the FHWA has funded the crossing improvement *and the warning devices are actually installed and operating*, the regulation 'displace[s] state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained.'"

Pet. App. 9a (second alteration in original) (quoting *Shanklin*, 529 U.S. at 354 (quoting *Easterwood*, 507 U.S. at 670)). But *Shanklin* cannot be read to have reached out to resolve an issue and a circuit conflict that were not presented and were not briefed: namely, the application of FRSA pre-emption to mid-project collisions. The passive devices at issue in *Shanklin* had been fully "installed" and "operating" long prior to the accident. *Shanklin*, 529 U.S. at 354.

In these quoted words, the *Shanklin* Court was differentiating the *Easterwood* situation in which federal funds *never* participated in the installation of warning devices because the installation component of the project was cancelled and funds reallocated.[12] See *id.* at 353-54 (discussing *Easterwood*). Understandably, the Court did not favor pre-emption by federal regulations that did not apply because no federal funds were "participat[ing] in the

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[12] There had been motion-detection circuitry installed, but such circuitry did "not meet the definition of warning devices provided in 23 C.F.R. §§ 646.204(i) and (j) (1992)," *Easterwood*, 507 U.S. at 672, so federal funds did not participate in the installation of warning devices as required for pre-emption. The passive warning devices installed in the instant case qualify as warning devices under 23 C.F.R. § 646.204.

installation of the devices." 23 C.F.R. § 646.214(b)(3)(i). The Court's distinction of the *Easterwood* case should not be read as a new pre-emption standard that is in conflict with the plain language of the regulation and the logic of this Court's decision.[13]

The regulations involved here make clear that federal authority displaced the railroad's authority by the time of the accident in this case. Federal regulations determine the adequacy of warning devices when federal funds participate in the installation of the devices. See *id.* § 646.214(b)(3). In this case, federal funds participated in the installation of the pavement markings and the signs, which were part of the project that was 90 percent funded by the federal government and ten percent by the State. See *id.* § 646.212(b)(3). Thus, the safety rules of the federal regulations provide the determination of adequacy, and once they apply, as here, the railroad does not have the authority to supply different warning devices.

Independently of the pre-emption effected by section 646.214, a separate regulation establishes that the FHWA is the authority on the adequacy of interim protection devices: the FHWA must approve the State-railroad agreement for crossing improvements, which shall include the protective services required during the performance of project. Specifically, 23 C.F.R. § 646.216(e)(2) provides that before advertising for bids or proceeding with construction, "[t]he plans, specifications and estimates must be approved by FHWA," and a "proposed agreement between the State and railroad must be found satisfactory by FHWA." *Id.* § 646.216(e)(2)(i)-(ii). Significantly, the "pertinent portions of the State-railroad agreement applicable to *any protective*

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[13] *Shanklin*, in setting forth the circuit conflict it was resolving, cited the Tenth Circuit's *Armijo* decision, *Shanklin*, 529 U.S. at 351, and adopted the Tenth Circuit's approach to the issue of whether passive devices could trigger pre-emption; *Shanklin* thus left *Armijo* as good law.

services required during performance of the work must be included in the project specifications and special provisions for any construction contract." *Id.* § 646.216(e)(2)(iv) (emphasis added). Here, the federally funded stop signs were installed as an additional interim safety device for this purpose. See MUTCD § 8B-9 (1988) (providing for stop signs at crossings as "an interim measure until active traffic control signals can be installed").

These regulations demonstrate that there is federal authority over interim safety, and railroads do not have the power to compel the state or local government agency to supply signals on public roads, or to delay the opening of a road. See MUTCD § 1A-3.1 (1988) ("Traffic control devices shall be placed only by the authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic."). The rule that interim measures during a grade crossing improvement are subject to federal approval thus has an independent pre-emptive effect, superseding any duties the State may have imposed on the railroad regarding interim measures. These regulations "cover the subject matter" of safety during a federally funded project for the installation of active traffic control devices, thus pre-empting state-law claims under the FRSA. See *Easterwood*, 507 U.S. at 664-65, 671. In addition, the explicit federal authority over mid-project safety reinforces the understanding that the application of 23 C.F.R. § 646.214 had federalized the crossing at the beginning of installation.

Indeed, in this case, the trial court ruled that the railroad had neither the duty nor the authority to close the Hendricks Street crossing during the installation project (something only a governmental authority can do, since the crossing is part of the public roadway system). The railroad had moved for judgment on the evidence on the issue of whether it was under a duty to ensure the closure of the Hendricks Street crossing during the upgrade, stating that there was "no evidence indicating that the Grand Trunk had any control

over the opening or closing of the crossing." C.A. App. 1701. The trial court agreed: "The Court will grant the motion for judgment on the evidence on that issue, and . . . the Court finds that the Defendant railroad neither had the duty nor the power to close that road." *Id.* at 1702 (omission in original). This ruling remains uncontested. Grand Trunk did not have the ability to require different warning devices or closure of the crossing in this case once the project had been federalized.[14]

The issue in this case is not whether the crossing should have opened before the gates were working, or what warning devices were best, but when federal law begins to govern. The regulations specify that this moment is when federal funds participate in installing the warning devices, as the Tenth Circuit has recognized. The Indiana Court of Appeals and other federal circuits, on the other hand, have delayed the effect of pre-emption until the last of the warning devices is installed.

If the Indiana Court of Appeals decision is permitted to stand, it will unfairly subject a railroad to liability for decisions that the regulations have removed from its control. Moreover, the differences among the courts will continue to undermine the national uniformity in railway safety regulation expressly required by Congress. When Congress passed the FRSA, it was addressing the haphazard nature of railroad safety regulation in the States, and one of the main goals of the legislation was to promote "[n]ational uniformity" in the area of railroad safety. 49 U.S.C. § 20106. Congress prescribed standards for federal pre-emption, and the FHWA promulgated regulations covering safety in the situation here: a federally funded grade crossing. The coexistence of different standards for federally funded grade crossings defies the federal legislative intent and defeats the

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[14] Project timing is also within the control of the state and the FHWA, not the railroad. *See, e.g.*, 23 C.F.R. §§ 646.218(c)(3), 646.216(e)(2).

purpose of the regulatory system on grade crossing safety. This Court should grant certiorari to promote the statutory goal of uniformity in rail safety.

* * * * *

Despite Congress's express policy decision that federal funding of warning devices and accompanying federal pre-emption of state law is the best means to effect railway safety, some courts continue to try to evade the FRSA's pre-emptive effect. This Court's immediate review is especially critical because the lower courts have erroneously regarded *Shanklin* as resolving a critical question of federal law that was never presented in that case. If the Court does not reverse summarily on the basis that federal funds installed passive devices, which requires reversal under *Shanklin*, this Court should grant certiorari to make clear that the railroad's state-law duty of care for warning devices ends when the process of installing federally approved and funded warning devices begins.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 12, 2002

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APPENDIX A

[SEAL] CLERK

SUPREME COURT, COURT OF APPEALS,
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Cause Number: 37A03-0004-CV-00140
Lower Court Number: 37C019004CT88

GRAND TRUNK WESTERN RAILWAY CO.

v.

KAPITAN, TAMERA LEE

SEAN GRAHAM-KENYON
KONOPA REAGAN & KENYON PC
P.O. Box 11237
South Bend, IN 46634-0237

You are hereby notified that the Supreme Court has on this day 11/14/01

This matter comes before the Indiana Supreme Court on a petition to transfer from a decision of the Court of Appeals, pursuant to Indiana Appellate Rule 57. The Court has reviewed the decision of the Court of Appeals, the record of proceedings, the briefs which were filed in the Court of Appeals, and the materials which were submitted in connection with the request to transfer jurisdiction. Each participating member of the Court has voted on the case. Each participating member of the Court has had the

opportunity to voice that Justices [sic] views on the appeal in conference with the other Justices.

Being duly advised, the Court now denies the Appellant's petition to transfer.

RANDALL T. SHEPARD
Chief Justice

All Justices Concur.

Witness my name and the seal of said Court, this 14th day of November, 2001.

/s/ Brian Bishop
Clerk Supreme Court, Court of Appeals, and Tax Court

APPENDIX B

IN THE COURT OF APPEALS OF INDIANA

[Filed Apr. 6, 2001]

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No. 37A03-0004-CV-140

GRAND TRUNK WESTERN RAILWAY COMPANY,
A corporation,
Appellant-Defendant,
vs.

TAMERA LEE KAPITAN, special
Administratrix of the Estate of RUDOLPH J. KAPITAN,
Appellee-Plaintiff.

APPEAL FROM THE JASPER CIRCUIT COURT
The Honorable E. Duane Daugherty, Judge
Cause No. 37C01-9004-CT-88

April 6, 2001

MEMORANDUM DECISION-
NOT FOR PUBLICATION

BAILEY, *Judge*

Case Summary

Appellant-Defendant Grand Trunk Western Railway Company ("Grand Trunk") appeals a jury verdict in favor of Appellee-Plaintiff Tamara Lee Kapitan ("Kapitan Estate"), special administratrix of the estate of Rudolph J. Kapitan ("Kapitan"). We affirm.

Issues

Grand Trunk raises four issues on appeal, which we consolidate and restate as follows:

I. Whether Kapitan's state tort law claim is preempted by federal law;

II. Whether the trial court abused its discretion when it allowed Kapitan's expert witnesses, Dr. William Berg ("Berg") and Dr. E. James Jennings ("Jennings"), to testify.

Facts and Procedural History

On November 6, 1988, a Grand Trunk train was traveling westbound as it approached the Hendricks Street crossing ("Crossing"), in Merrillville, Indiana. (R. 1642, 1661.) At the same time, Kapitan approached the Crossing by car. (R. 1642.) The train and Kapitan's car collided. (R. 1642.) Kapitan died as a result of the collision.

On December 2, 1989, Kapitan's Estate filed suit against Grand Trunk and its train conductor Richard Enos ("Enos"). (R. 15-17.) Included in the Kapitan Estate Complaint were allegations that Grand Trunk and Enos failed to provide adequate warning devices at the Crossing. (R. 16.) In their Answer, Grand Trunk and Enos denied any negligence and further asserted that the Federal Rail Safety Act and Highway Safety Act preempted claims regarding the Crossing's level of protection. (R. 18-20.)

On November 28, 1994, Grand Trunk and Enos filed a Motion for Partial Summary Judgment on Kapitan's claim that they failed to provide sufficient warning devices at the Crossing, including flashing lights and gates. (R. 22-23.) On July 13, 1995, the trial court granted summary judgment, finding that Kapitan's claim of inadequate warning devices at the Crossing was a "state law claim . . . preempted by federal law, and therefore said claim must fail." (R. 219.) Thereafter, Kapitan brought an interlocutory appeal. (R. 221-22.) On April 11, 1997, in a memorandum opinion, this Court reversed the trial court's decision as to preemption, writing in part that "[b]ecause the federally approved warning devices were not yet operational at the time of Kapitan's accident, preemption had not occurred as of the accident, and summary judgment must be reversed on this issue." *Kapitan v. Grand Trunk Western Railway Co.*, No. 37C01-9004-CT-88, slip op. at 3 (Ind. Ct. App. 1997).

Thereafter, a jury trial was scheduled for January 31, 2000. On January 24, 2000, the trial court heard oral arguments regarding several pre-trial motions. Included in these motions were Grand Trunk's motion for a continuance of the trial pending the United States Supreme Court's decision in *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 120 S.Ct. 1467, 146 L.Ed. 374 (2000), and Grand Trunk's motions to exclude, or in the alternative, limit the expert testimony of Berg and Jennings. (R. 254-56, 575-577, 621-23). In addition, Grand Trunk filed a separate motion in limine to bar evidence of reports of other accidents that occurred at the Crossing prior to Kapitan's accident. (R. 355-60.) The trial court denied Grand Trunk's motions and their renewed objections at trial. (R. 617, 741-46, 1047.)

On February 3, 2000, the jury returned a verdict in favor of Kapitan, with total damages in the sum of $5,109,480.00, which, multiplied by the jury's determination that Grand Trunk was fifty percent at fault, resulted in a verdict of $2,554,740.00 in favor of Kapitan. Additional facts appear as needed.

Discussion and Decision

I. *Federal Preemption*

A. *Rule of Law*

The preemption doctrine is founded upon the Supremacy Clause of Article Six of the United States Constitution, which invalidates those state laws that interfere with, or are contrary to federal law. U.S. Const. Art. VI, Cl. 2; *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985).

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 368-69 (1986) (citations omitted). "The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." *Id.* at 369.

> Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is pre-empted if the law actually conflicts with federal law, or if federal law so thoroughly

> occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (quotations and citations omitted).

B. *Analysis*

The express preemption provision of the Federal Railroad Safety Act of 1970 ("FRSA"), reads as follows:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106. Following the enactment of the Highway Safety Act of 1973, § 203, 87 Stat. 283, which in turn created the Federal Railway-Highway Crossings Program ("Crossings Program"), 23 U.S.C. § 130, several regulations were promulgated to implement the Crossings Program. Included in these regulations are sections that address the adequacy of warning devices installed under the Crossings Program. Specifically, 23 C.F.R. §§ 646.214(b)(3) and (4) provide as follows:

> (3)(i) adequate warning devices, under . . . any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:
>
> (A) Multiple main line railroad tracks.
>
> (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences. Or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of [the Federal Highway Administration] FHWA.

Here, on August 1, 1988, the FHWA approved the Hendricks Street Crossing upgrade project as previously agreed to between the town of Merrillville and Grand Trunk, and committed federal funds to pay for the project. In October of 1988 the Crossing was closed, as a contractor hired by Merrillville began construction on the approaches to the Crossing, striped the pavement, and installed pavement markings. Additionally, the Merrillville Street Department placed two new "Stop Ahead" signs, two "Tracks" signs, two "Stop" signs and reinstalled the "Railroad Crossing" signs. During this period of time Grand Trunk also poured foundations for the gates and flashers. The Crossing was reopened in November. However, at the time of Kapitan's accident the flashers and gates were not yet operational. The flashing lights and gates were installed by December 1, 1988.

In *Norfolk Southern Railway Company v. Shanklin*, the Supreme Court granted certiorari

> to resolve a conflict among the Courts of Appeals as to whether the [Federal Railroad Safety Act], by virtue of 23 C.F.R. §§ (b)(3) and (4) (1999), pre-empts state tort claims concerning a railroad's failure to maintain adequate warning devices at crossings where federal funds have participated in the installation of the devices.

120 S.Ct. 1467, 1473. There, the case involved an action for damages against a railroad for failure to maintain adequate warning devices at a grade crossing in western Tennessee. The respondent claimed that the warning signs posted at the crossing, which had been installed using federal funds, were insufficient to warn motorists of the danger of passing trains. The Supreme Court held as follows:

> [O]nce the FHWA has funded the crossing improvement *and the warning devices are actually installed and operating*, the regulation "displace[s] state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained."

Id. at 1474 (quoting *CSX v. Easterwood*, 507 U.S. 658, 670 (1993)) (emphasis added). Accordingly, the Supreme Court ruled that since the FHWA had "approved the project and the signs were installed using federal funds, the federal standard for adequacy displaced Tennessee statutory and common law addressing the same subject, thereby pre-empting respondent's claim." *Id.* at 1477.

In our previous unpublished decision of *Kapitan v. Grand Trunk Western Railway Co.*, No. 37C01-9004-CT-88, slip op. at 3 (Ind. Ct. App. 1997) we held that "[b]ecause the federally approved warning devices were *not yet operational* at the time of Kapitan's accident, preemption had not occurred as of the accident, and summary judgment must be reversed on this

issue." (Emphasis added.) This language is consistent with the Supreme Court's opinion in *Shanklin*. Accordingly, we affirm our previous ruling that Kapitan's state tort claim was not preempted by federal regulations.

II. *Expert Testimony*

A. *Standard of Review*

The proponent of expert testimony has the burden of proving the reliability of the principles upon which the expert's testimony rests. *McGrew v. State*, 682 N.E.2d 1289, 1290 (Ind. 1997). In determining whether expert testimony is reliable, the trial court assumes the function of "gatekeeper" in ensuring that an expert's testimony rests on a reliable foundation and is relevant to the issue at hand. *Wallace v. Meadow Acres Manufactured Housing , Inc.*, 730 N.E.2d 809, 812 (Ind. Ct. App. 2000) (quoting *Hottinger v. Truegreen Corp.*, 665 N.E.2d 593, 596 (Ind. Ct. App. 1996)). The trial court's determination regarding the admissibility of expert testimony under Rule 702 is a matter within its broad discretion, and will be reversed only for an abuse of that discretion. *Sears Roebuck and Co. v. Manuilov*, WL 51680 at 6 (Ind. 2001).

B. *Rule of Law*

Indiana Rule of Evidence 702 provides as follows:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

This Rule was not intended to interpose an unnecessarily burdensome procedure methodology for trial courts. *Manuilov*, WL 51806 at 7.

> By requiring trial courts to be satisfied that expert opinions will assist the fact-finder and that the underlying scientific principles are reliable, Rule 702 guides the admission of expert scientific testimony. Although it authorizes the exclusion of purported scientific evidence when the trial court finds that it is based on unreliable principles, the adoption of Rule 702 reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence.

Id. As only reliable evidence will assist the trier of fact, reliability is a threshold issue under Indiana Evidence Rule 702 analysis. *Wallace*, 730 N.E.2d at 813.

> Once the trial court is satisfied that the expert's testimony will assist the trier of fact and that the expert's general methodology is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact.

Manuilov, WL 51806 at 7.

C. *Analysis of Expert Testimony Offered by Jennings and Berg*

1. Jennings—Future Earnings

Jennings testified regarding the economic loss to the Kapitan Estate that resulted from the death of Kapitan. Grand Trunk contends that Jennings's testimony should have been barred or limited because "Jennings failed to adhere to facts and procedure reasonably relied upon by economists." Appellant's Brief at 15. Specifically, Grand Trunk argues that to properly arrive at Kapitan's lost future earnings, Jennings needed to evaluate the Kapitan family's used car business. Appellant's Brief at 16. Jennings did not evaluate Kapitan Motors. Instead, to arrive at a projected economic loss figure, Jennings con-

sidered Kapitan's history of wage income, business investment and household services. Jennings determined that the total value of losses was $17,577,026.85. This figure was reduced to $14,630,448.16 after adjustments were made for taxes and personal consumption.

The following is an excerpted summary of Jennings's "Report Evaluating the Economic Loss to the Estate of Rudolph Kapitan[,]" which was attached to Grand Trunk's motions to bar, or in the alternative, to limit Jennings testimony at trial:

> Background
>
> Rudolph Kapitan, was born on May 3, 1958 and was injured and died on November 6, 1988. He was married to Tamera and worked for the family used car business for approximately eight years before his death. Had he not died he could have provided his family with wage income, profit from his business investment and household services. As a consequence of his death, his family will either lose these benefits or must pay someone else to provide them.
>
> Foundation
>
> A man of Rudolph Kapitan's age has a work expectancy of sixty-one and one-half (61.5) years. . . . . If this figure is adjusted proportionately to life expectancy increases, the worklife is nearly sixty-five (65) years. . . .
>
> Rudolph Kapitan is projected to have worked, for the remainder of his active worklife, in the same occupation and at the same level he held at the time of his injury, with one exception. At the time of his death, his family had begun planning for a buyout of the firm on his part. Wage growth projections are based upon two sources. The wage base is founded upon the actual recent experience of Mr. Kapitan prior to his death. Since only

limited data regarding Mr. Kapitan['s] past wage was available the pattern of growth in the used car sales sector of the economy was [also] analyzed.

. . . .

The family corporation (KMI) had experienced substantial growth over the last six years of Rudolph's life.

. . . .

At the time of his death, Rudolph Kapitan had a life expectancy of 47.44 additional years according to a combination of sources that take into consideration age, gender, race and work status.

In order to compensate Rudolph Kapitan and his estate for the losses that have been or will be incurred as a result of his injury [$17,577,026.85] must be set aside today. . . .

Adjustments: Taxes and Personal Consumption

[After subtracting the "Net Tax Impact" and "Personal Consumption" that resulted from Kapitan's death] the net economic loss to the Kapitan estate, is $14,630,448.16.

(R. 633-637, 690-94).

Grand Trunk countered, by way of an affidavit, cross-examination and argument.

The affidavit of Dr. James A. Bernard provided in relevant part as follows:

6. In valuing the estimated income lost to an estate which involves the potential lost profits of a small business, one of the following methods is considered valid and acceptable by forensic economists, CPA's, and financial analysts: 1. Capitalized Earnings Stream; 2. Actual Sale of Ownership Interest; 3. Business Sale

> Pricing. None of these methods is used by Dr. Jennings in coming to his conclusions. Dr. Jennings used projected sales growth of used cars but not sales of used car businesses and his analysis ignores the "comparable" sales methodology.
>
> 7. In addition, his chosen discount (capitalization) vehicle is inappropriate and not valid[.]
>
> 8. As Dr. Jennings' only method of analysis of Kapitan Motors, Inc. is projected sales growth discounted at Treasury Security rates and since he does not use an acceptable methodology for valuing lost earnings, his conclusion as to the income lost to the estate is invalid, inaccurate and unreliable.
>
> 9. Dr. Jennings' opinion is not based on adequate facts, data or established methodology.

(R. 639.) Jennings did not contest the fact that he did not evaluate the family-owned business, nor that he was not qualified to do so. Instead, Jennings asserted that he relied on facts and methodology customarily used by economists to predict Kapitan's future earnings. That is, a methodology that factored in such figures as Kapitan's salary at death (approximately $66,000.00), his working-life expectancy (47.44 additional years), the growth rate of used car sales in Indiana (10.2 percent), and the value of Kapitan's household services. These figures, which included some specific to Kapitan and others that were averages regarding the used car business in Indiana, were derived from tax forms, government statistics, and published studies. Jennings [sic] methodology, simplified, used these limited, but supported past figures, to predict the future lost earnings to the Kapitan Estate as a result of Kapitan's death.

It is difficult for this Court to discern how an *accurate* projected lost earnings figure can be determined for an employee of a family owned business without an evaluation

of *that* business. Nevertheless, we find this concern to be a matter affecting weight and credibility, rather than one questioning Jennings's scientific standards. Grand Trunk effectively addressed this issue on cross-examination and as such it was properly placed before the jury where it's weight and impact on credibility could be determined. *See Manuilov*, WL 51806 at 7. Given our supreme court's "intent to liberalize, rather than to constrict, the admission of reliable scientific evidence[,]" *see Manuilov*, WL 51806 at 7, the broad discretion due the trial court on these matters, and Jennings's supporting testimony regarding his methodology, we do not find that the trial court abused its discretion by permitting Jennings to testify.

2. Berg—Hazardous Hendricks Street Crossing

Berg testified as to both the general characteristics of hazardous railroad crossings and the specific hazards presented by the Hendricks Street Crossing. Grand Trunk argues that "Berg relied on irrelevant evidence[,]" "failed to adhere to facts and procedure reasonably relied on by experts in his field[,]" and "was impermissibly allowed to fix the duties of the parties." Appellant's Brief at 20-21. We disagree.

Grand Trunk bases its' "irrelevant evidence" argument on the fact that Berg's testimony focused on the conditions and accident history at the Crossing prior to the improvements made in October of 1988, and thus prior to Kapitan's accident. Grand Trunk contends that Berg's testimony did not include prior *similar* accidents, and therefore was not relevant. Grand Trunk relies upon *Indiana State Highway Commission v. Fair*, 423 N.E.2d 738, 740 (Ind. Ct. App. 1981), where this Court adopted the language of 40 Am.Jur.2d *Highways, Streets, and Bridges* § 601 at 79 (1968), and stated:

> Evidence of other accidents is not properly admissible in any action to recover for injuries sustained as a result of

> a highway defect or obstruction where it is not shown that the other accidents occurred from *the same cause*, at the same place, and *under substantially similar conditions*.

However, the admission of prior accidents of similar characteristics under the same circumstances to prove the existence of a dangerous condition and notice thereof is a matter left to the discretion of the trial court. *Pederson v. White*, 511 N.E.2d 460, 465 (Ind. Ct. App. 1987). Moreover, "it is appropriate to relax the requirement of similar conditions when the offer of proof is to show notice of the dangerous character of the crossing rather than defendant's negligence." *Gardner v. Southern Railway Systems*, 675 F.2d 949, 952 (7th Cir. 1982).

Here, Berg testified to the number of accidents that took place at the Crossing from 1974 to 1987 and the significance of the frequency of those accidents as it related to his determination that the Crossing was hazardous. This testimony was relevant to show that Grand Trunk knew of the hazardous conditions at the Crossing. Furthermore, any prejudice that may have resulted from the incorrect inference that the Crossing presented the same hazards at the time of Kapitan's accident was effectively dispelled on cross-examination, where Grand Trunk established that various improvements had been completed in the month prior to Kapitan's death, and after the time period referenced by Berg. Berg's testimony remained reliable and assisted the jury.

Next, Grand Trunk asserts that there were inconsistencies in Berg's methodology. Specifically, Grand Trunk casts doubt on Berg's factoring of the hump that was removed underneath the Crossing. While testifying as an expert in a separate railway case Berg testified that a "hump roadway profile" contributed to a crossing being extra-hazardous. *Bickley v. Norfolk Western Railway Co.*, 60 F.Supp.2d 732,

736 (N.D. Ohio 1998). Yet, here Berg testified that "when you change the grade, you now encourage and facilitate higher approach speeds. Now, that can be a problem if you don't have adequate signals, which you didn't have at this crossing." (R. 1135.) Subsequently, on cross-examination, Berg testified that "you want relatively flat approaches [to crossings]." (R. 1166.) The resolution of any perceived inconsistencies is within the province of the jury.

Lastly, Grand Trunk asserts that Berg was "impermissibly allowed to fix the duties of the parties." Appellant's Brief at 21. Specifically, Grand Trunk complains that Berg created an inference that it was responsible for anticipating that drivers would ignore STOP signs. However, the record does not support this allegation.

> Q: [Grand Trunk] So motorists then, if I understand what you're saying, could simply not comply with [a STOP sign] and didn't have to take responsibility for the consequences?
>
> A: [Berg] No, I'm not saying that at all. What I'm talking about as an engineer is, what we want is good behavior in whatever way we can achieve it. And if I put in the wrong traffic control device, it's not going to get . . . elicit good behavior, then I've got a problem. And so the issue is the failure to do the proper engineering so that drivers would have had a credible device that gave them the information they needed when they need it.

(R. 1275.) Berg's testimony did not "fix" the duties of the parties. For the above reasons the trial courts decision to admit Berg's testimony was not an abuse of discretion.

Affirmed.

RILEY, J., and BARNES, J., concur.

APPENDIX C

IN THE COURT OF APPEALS OF INDIANA

[Filed Jun 5, 1997]

ATTORNEY FOR APPELLANT:

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ATTORNEY FOR APPELLEE:

ROBERT G. DEVETSKI
KONOPA & MURPHY
South Bend, Indiana

No. 37A03-9511-CV-364

TAMERA LEE KAPITAN, Special
Administratrix of the Estate of RUDOLPH J. KAPITAN,
Appellant-Plaintiff,

vs.

GRAND TRUNK WESTERN RAILWAY COMPANY,
a Corporation, and RICHARD ENOS,
Appellees-Defendants.

APPEAL FROM THE CIRCUIT COURT
OF JASPER COUNTY
The Honorable E. Duane Daugherty, Judge
Cause No. 37C01-9004-CT-88

April 11, 1997

MEMORANDUM DECISION-
NOT FOR PUBLICATION

STATON, *Judge*

The administratrix of the estate of Rudolph J. Kapitan appeals the trial court's grant of summary judgment to the Grand Trunk Western Railway on the grounds that the estate's claim that the railroad negligently failed to place adequate warning devices at the train crossing was preempted by federal law. The railroad cross appeals the denial of its motion for summary judgment on the estate's claim that the railroad was negligent in failing to maintain an unobstructed view of the tracks for motorist. Two issues are presented:

I. Was Kapitan's claim for failure to place adequate warnings at the train crossing preempted by federal law.

II. Was summary judgment improperly denied against Kapitan's claim that the view of the tracks was obstructed.

We affirm in part and reverse in part.

On November 6, 1988, Kapitan was killed when his car was struck by a Grand Trunk Western Railway train at a crossing in Merrillville. Prior to Kapitan's collision, the railroad received federal approval and funding for an upgrade of the warning devices at that crossing, but the warning devices were not operational until several months after the accident.

I.

Preemption

After the trial court's grant of summary judgment in this case, we ruled that Indiana common law tort claims charging a railroad with negligence for inadequate warning devices at a railroad crossing are not preempted by the Federal Railway Safety Act of 1970, 49 U.S.C. § 20101 *et. seq.*, and specifically 23 C.F.R. § 646.214(b)3 and 4, until federally

authorized warning devices are actually operating. *Estate of Martin v. Consol. Rail Corp.*, 667 N.E.2d 219, 222 (Ind. Ct. App. 1996). In *Martin* we approved the Seventh Circuit's reasoning in *Thiele v. Norfolk & Western Ry. Co.*, 68 F.3d 179, 183 (7th Cir. 1995), noting that any other interpretation would leave the public unprotected during the time between approval of a project to install federally authorized warning devices and actual installation of the warning devices. Because the federally approved warning devices were not yet operational at the time of Kapitan's accident, preemption had not occurred as of the accident, and summary judgment must be reversed on this issue. *Martin, supra.*

II.

Obstructed View

Grand Trunk appeals the trial court's denial of its motion for summary judgment on Kapitan's claim that the view of its tracks was not unobstructed for the 1,500 feet required by IND. CODE § 8-6-7.6-1 (1972).

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). The burden is on the moving party to prove there are no genuine issues of material fact and it is entitled to judgment as a matter of law. When reviewing an entry of summary judgment, we stand in the shoes of the trial court. We do not weigh the evidence but will consider the facts in the light most favorable to the nonmoving party. *Reed v. Luzny*, 627 N.E.2d 1362, 1363 (Ind. Ct. App. 1994), *reh. denied, trans. denied.*

Kapitan and Grand Trunk present conflicting affidavits as to whether the view of the tracks was clear within the distance prescribed by law.

Kapitan presented an affidavit stating that the view was obstructed. Grand Trunk attacks Kapitan's affidavit as

insufficient to create a genuine factual issue because the affiant did not state from exactly what spot he was unable to view the tracks.

Grand Trunk presented an affidavit stating that the view was unobstructed. Kapitan attacks Grand Trunk's affidavit as defective because its view of the tracks was from an elevated position.

The conflicting evidence, and arguments as to the weight which should be afforded to the evidence, leaves a genuine factual issue to be determined at trial as to whether the view of the tracks was unobstructed within the distance prescribed by law. The trial court's denial of summary judgment as to the obstructed view claim is therefore affirmed.

Affirmed in part, reversed in part.

GARRARD, J., and NAJAM, J., concur.

APPENDIX D

STATE OF INDIANA
COUNTY OF JASPER
JASPER CIRCUIT COURT

[Filed Jul 13, 1995]

Cause No. 37C01-9004-CT-088

TAMERA LEE KAPITAN, Special
Administratrix of the Estate of Rudolph J. Kapitan,
Plaintiff,

-vs-

GRAND TRUNK WESTERN RAILROAD COMPANY,
a Corporation, and RICHARD ENOS,
Defendants.

ORDER

The Plaintiff having heretofore filed her Petition for Interlocutory Appeal, and the Defendants having filed their objection thereto, the Court now finds that said petition should be determined without hearing thereon.

The Court, having reviewed the Plaintiff's petition and the Defendants' objection, and being duly advised in the premises, now finds that said petition should be overruled and denied.

IT IS THEREFORE ORDERED AND DECREED by the Court that the Plaintiff's Petition for Interlocutory Appeal is hereby overruled and denied.

ORDERED THIS 14TH DAY OF JULY, 1995.

/s/ E. Duane Daugherty
E. DUANE DAUGHERTY, Judge
Jasper Circuit Court

APPENDIX E

STATE OF INDIANA
COUNTY OF JASPER
JASPER CIRCUIT COURT

[Filed Jul 13, 1995]

Cause No. 37C01-9004-CT-088

TAMERA LEE KAPITAN, Special
Administratrix of the Estate of
Rudolph J. Kapitan,
Plaintiff,

-vs-

GRAND TRUNK WESTERN RAILROAD COMPANY,
a Corporation, and RICHARD ENOS,
Defendants.

ORDER

This matter came on for hearing on the Defendants' Motion for Summary Judgment. Thereafter the Court took the matter under advisement and, having reviewed the same and being duly advised in the premises, now finds as follows:

The Plaintiff, in her Complaint, has alleged that the Defendants were negligent in failing to sound the train whistle, failing to have a "clear view" of the railroad crossing, and failing to have proper warning devices at said crossing, and that as a result thereof, the Plaintiff has sustained damages.

The Defendants have conceded that there is an issue of fact with regards to whether or not the train failed to sound the train whistle and, therefore the Defendants are seeking partial summary judgment on the Plaintiff's other two allegations.

With regards to the Plaintiff's claim that the Defendants were negligent for failure to have a "clear view" of the railroad crossing, the Court finds that the Plaintiff has submitted the affidavit of Ricky Lee Wise in opposition to the Defendants' allegations. The Defendants have argued that said affidavit is insufficient to create an issue of fact for reason that the affiant indicated that there was not a clear view of said grade crossing, however he was not specific as to the location where the view of oncoming trains was obstructed.

The Court further finds that while the Defendants' argument has some merit, the Court, in determining a motion for summary judgment, cannot weigh the evidence, but must determine if there is conflicting evidence of probative value. Further, all inferences which can be drawn from the facts must be drawn in favor of the non-moving party.

The Court finds that the inference which can be drawn from said affidavit is that the view of the railroad crossing was not clear within the distance prescribed by law.

The Court therefore finds that there is a material issue of fact as to whether or not the Defendants were negligent in failing to have a "clear view" of the railroad crossing, and that therefore the Defendants are not entitled to a partial summary judgment on said issue.

With regards to the issue of whether or not the Defendants were negligent in failing to have proper warning devices at the railroad crossing, the Court finds the uncontested facts to be as follows:

1. On November 6, 1988, the Grand Trunk Western Railroad Company owned and maintained a railroad right-of-way which intersects with Hendricks Street in the Town of Merrillville, Lake County, Indiana, hereinafter referred to as the Hendricks Street crossing.

2. At approximately 7:45 a.m. on November 6, 1988, the Grand Trunk Western Railroad Company owned freight train #371, which train was being operated by Richard Enos, who was the engineer of said train. Further, at said time, train #371 was travelling in a westerly direction over the Hendricks Street crossing.

3. At said time and place, Rudolph J. Kapitan was operating a motor vehicle in a southerly direction on Hendricks Street at its intersection with the Grand Trunk railroad track.

4. At said time and place, a collision occurred between the lead engine of train #371 and the vehicle operated by Rudolph J. Kapitan, which collision resulted in the death of Mr. Kapitan.

5. On September 9, 1986, engineering estimates concerning the placement of flashing lights and gates at the Hendricks Street crossing were performed by Grand Trunk personnel for the purpose of obtaining federal approval for an improvement project at said crossing.

6. On January 20, 1988, a proposed agreement for a federally-funded grade crossing improvement project for the Hendricks Street crossing was sent to Grand Trunk for its approval.

7. By July 12, 1988, the State of Indiana approved the agreement to upgrade the Hendricks Street crossing.

8. On August 1, 1988, the Federal Highway Administration approved the Hendricks Street crossing upgrade project, obligating federal funds to pay for the project.

9. On August 26, 1988, the State of Indiana, pursuant to authorization from the Federal Highway Administration, notified the Grand Trunk to assign a work order for the Hendricks Street crossing project and to begin purchasing the necessary materials for implementing the project.

10. On or before December 1, 1988, the flashing lights and gates were installed at the Hendricks Street crossing, but the project was completed and payments made after the collision occurred on November 6, 1988.

There is no dispute that the Federal Railroad Safety Act of 1970 has preempted the Indiana Tort Law with regards to the issue of the warning devices at the Hendricks Street crossing. However, based upon the uncontested facts, the issue for the Court's determination is whether federal law preempted Indiana tort law when the Federal Highway Administration approved the Hendricks Street crossing improvement project and obligated federal funds to pay for the same in August, 1988, or whether the preemption occurred on or about December 1, 1988, when the project was completed and flashing lights and gates installed.

This issue of preemption was decided by the United States Supreme Court in *CSX Transp., Inc. v. Easterwood*, 113 S.Ct. 1732 (1993). Further, there have been several lower court decisions interpreting the same.

Based upon said federal case, the Defendants have argued that the Plaintiff's claim that the Defendants were negligent under Indiana law for failing to maintain adequate warning devices at the Hendricks Street crossing was preempted by the Federal Railroad Safety Act of 1970 prior to the November 6, 1988 collision.

The issue presented to the United States Supreme Court in the *Easterwood* case was the extent to which the Federal Railroad Safety Act of 1970, as amended, and the regulations promulgated by the Secretary of Transportation pursuant to said statute, preempted the law of the State of Georgia.

In the *Easterwood* case, the Supreme Court held that the provisions of 23 CFR 646.214(b)(3) and (4), when applicable, do preempt state tort law as such regulations establish requirements as to the installation of particular warning

devices. The Supreme Court held "in short, for projects in which federal funds participate in the installation of warning devices, the secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The secretary's regulations, therefore, cover the subject matter of state law which, like the tort in law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings."

The Supreme Court further held that while the federal regulations do displace state's decision-making authority by requiring particular warning devices, the regulations did not apply to the facts of the *Easterwood* case because a plan to install such devices at the crossing at issue was shelved and the federal funds allocated for the project were diverted elsewhere.

Since the *Easterwood* decision, there is no question that 23 CFR 646.200 et seq. preempts state negligence law in the areas covered thereby. However, the issue which has divided the lower federal courts is what event triggers the preemption.

In *St. Louis S.W. Ry. Co. v. Malone Freight Lines*, 39 F.3d 864 (8th Cir. 1994), the Eighth Circuit Court of Appeals held that preemption occurs when all of the devices prescribed in the Federal Highway Administration's approved upgrade plan are installed and operating.

At the other end of the spectrum is a case from the United States Court of Appeals, Tenth Circuit. In *Hatfield v. Burlington Northern R. Co.*, 1 F.3d 1071 (10th Cir. 1993), the Court of Appeals, in addressing the preemption issue, stated: "Thus, the precise issue to be resolved here is whether 'federal-aid funds participated in installation of a warning device' prior to the collision involving Mr. Hatfield." The court determined that preemption could occur when engineering services are utilized in the project and these services are remunerated by federal funds.

The United States Seventh Circuit Court of Appeals, in *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994), adopted a position somewhat in between the holdings of the Eighth and Tenth Circuits. In the *Shots* case, the Seventh Circuit Court of Appeals held that the Secretary of Transportation's determination of the devices to be installed, and not the completion of the installation itself, would trigger preemption. The Seventh Circuit Court of Appeals did not find that the plaintiffs' state law claim had been preempted in this case for reason that, although crossbucks had been installed with federal funds, the Secretary of Transportation had not prescribed the crossbucks or any other warning devices at the crossing at which the plaintiffs were injured. The court thus found that the Secretary of Transportation had not covered the relevant subject matter, and that therefore the Secretary of Transportation's regulations did not preempt the plaintiffs' state claim.

The Court further finds that the facts of a case decided by the Honorable William C. Lee, Judge of the United States District Court for the Northern District of Indiana, are very similar to the uncontested facts in this cause. In *Thiele v. Norfolk and Western Railway Company*, 873 F.Supp. 1240 (N.D. Ind. 1994), the plaintiff sued the defendant railroad company as a result of personal injuries sustained on March 6, 1992, when the defendant's train struck the left side of the plaintiff's vehicle at a railroad intersection in Yoder, Indiana. Among other things, the plaintiff alleged that the defendant had willfully and wantonly failed to modify the grade crossing warning devices after becoming aware of their inadequate nature.

In said decision, Judge Lee analyzed the *Easterwood* decision and its prodigies, and stated that the holding of the Eighth Circuit Court of Appeals in the *Malone* case was inconsistent with the holding of the Seventh Circuit Court of Appeals in the *Shots* case. Judge Lee further stated that the language of the *Easterwood* case clearly supports the holding

of the Seventh Circuit Court of Appeals in the *Shots* case in that it is the Secretary of Transportation's determination of the devices to be installed, not the completion of the installation itself, that triggers preemption.

This Court finds that Judge Lee has correctly stated the law as it pertains to the Plaintiff's state law claim in this cause. Further, in adopting the United States Seventh Circuit Court of Appeals' determination of preemption as enumerated in the *Shots* decision, and applying the same to the facts of this case, the Court finds that the United States Secretary of Transportation had covered the relevant subject matter of the Plaintiff's state law claim with regards to warning devices at the Hendricks Street crossing, and that federal law had preempted state law in August, 1988.

The Court therefore finds that there is no issue of fact unresolved with regards to the Plaintiff's claim of negligence on the part of the Defendants for failing to have proper warning devices at the Hendricks Street crossing where the accident occurred, as the Plaintiff's state law claim has been preempted by federal law, and therefore said claim must fail. Further, that the Defendants are entitled to a judgment as a matter of law on the issue of inadequate warning devices and that the Defendants' Motion for Partial Summary Judgment should be granted as to said issue.

IT IS THEREFORE ORDERED AND DECREED by the Court that the Defendants' Motion for Partial Summary Judgment as to the Plaintiff's claim that the Defendants failed to maintain a clear view of the railroad crossing is overruled and denied.

FURTHER ORDERED that the Defendants' Motion for Partial Summary Judgment as to the issue of improper warning devices is hereby granted and judgment is hereby entered for the Defendants, Grand Trunk Western Railroad Company and Richard Enos, and each of them, and against

the Plaintiff, Tamera Lee Kapitan, Special Administratrix of the Estate of Rudolph J. Kapitan, and the Plaintiff shall take nothing by way of her complaint against the Defendant on the issue of warning devices at said railroad crossing.

ORDERED THIS 13th DAY OF JULY, 1995.

/s/ E. Duane Daugherty,
E. DUANE DAUGHERTY, Judge
Jasper Circuit Court

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APPENDIX F

STATUTES

23 U.S.C. § 109. Standards

* * * *

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

* * * *

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 894; Pub.L. 88-157, § 4, Oct. 24, 1963, 77 Stat. 277; Pub.L. 89-574, §§ 5(a), 14, Sept. 13, 1966, 80 Stat. 767, 771; Pub.L. 91-605, Title I, § 136(a), (b), Dec. 31, 1970, 84 Stat. 1734; Pub.L. 93-87, Title I, §§ 114, 152(2), 156, Aug. 13, 1973, 87 Stat. 257, 276, 277; Pub.L. 95-599, Title I, §§ 113, 116(d), 141(f), (g), Nov. 6, 1978, 92 Stat. 2696, 2699, 2711; Pub.L. 96-106, § 3, Nov. 9, 1979, 93 Stat. 797; Pub.L. 97-424, Title I, § 110(a), Jan. 6, 1983, 96 Stat. 2105; Pub.L. 102-240, Title I, § 1016(c) to (f)(1), Dec. 18, 1991, 105 Stat. 1946; Pub.L. 104-59, Title III, §§ 304, 305(a), Nov. 28, 1995, 109 Stat. 579, 580; Pub.L. 105-178, Title I, §§ 1202(c), 1212(a)(2)(A), 1306, June 9, 1998, 112 Stat. 170, 193, 229.)

23 U.S.C. § 130. Railway-highway crossings

(a) Subject to section 120 and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings,

may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State transportation department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request

the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects.—Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices.—At least 1/2 of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment.—Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed

with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report.—Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway [1] crossings program.

(h) Use of funds for matching.—Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

(i) Incentive payments for at-grade crossing closures.—

(1) In general.—Notwithstanding any other provision of this section and subject to paragraphs (2) and (3), a

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[1] So in original. Probably should be "railroad-highway".

State may, from sums available to the State under this section, make incentive payments to local governments in the State upon the permanent closure by such governments of public at-grade railway-highway crossings under the jurisdiction of such governments.

(2) Incentive payments by railroads.—A State may not make an incentive payment under paragraph (1) to a local government with respect to the closure of a crossing unless the railroad owning the tracks on which the crossing is located makes an incentive payment to the government with respect to the closure.

(3) Amount of State payment.—The amount of the incentive payment payable to a local government by a State under paragraph (1) with respect to a crossing may not exceed the lesser of—

(A) the amount of the incentive payment paid to the government with respect to the crossing by the railroad concerned under paragraph (2); or

(B) $7,500.

(4) Use of State payments.—A local government receiving an incentive payment from a State under paragraph (1) shall use the amount of the incentive payment for transportation safety improvements.

(j) Bicycle safety.—In carrying out projects under this section, a State shall take into account bicycle safety.

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 903; Pub.L. 100-17, Title I, § 121(a), Apr. 2, 1987, 101 Stat. 159; Pub.L. 104-59, Title III, § 325(a), Nov. 28, 1995, 109 Stat. 591; Pub.L. 104-205, Title III, § 353(b), Sept. 30, 1996, 110 Stat. 2980; Pub.L. 105-178, Title I, §§ 1111(d), 1202(d), 1212(a)(2)(A)(i), June 9, 1998, 112 Stat. 146, 170, 193.)

23 U.S.C. § 409. Discovery and admission as evidence of certain reports and surveys

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying [1] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

(Added Pub.L. 100-17, Title I, § 132(a), Apr. 2, 1987, 101 Stat. 170; Pub.L. 102-240, Title I, § 1035(a), Dec. 18, 1991, 105 Stat. 1978; Pub.L. 104-59, Title III, § 323, Nov. 28, 1995, 109 Stat. 591.)

49 U.S.C. § 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

(1) is necessary to eliminate or reduce an essentially local safety hazard;

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[1] So in original. Probably should have a comma inserted.

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

(July 5, 1994, Pub.L. 103-272, § 1(e), 108 Stat. 866.)

APPENDIX G

REGULATIONS

23 C.F.R. § 646.214 Design.

(a) *General.* (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice for Federal-aid projects.

(b) *Grade crossing improvements.* (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) *Adequate warning devices*, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school-buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) *Grade crossing elimination.* All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the highway (a freeway) regardless of the volume of railroad or highway traffic.

[40 FR 16059, April 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982; 62 FR 45328, Aug. 27, 1997]

23 C.F.R. § 646.216 General procedures.

(a) *General.* Unless specifically modified herein, applicable Federal-aid procedures govern projects undertaken pursuant to this subpart.

(b) *Preliminary engineering and engineering services.* (1) As mutually agreed to by the State highway agency and railroad, and subject to the provisions of § 646.216(b)(2), preliminary engineering work on railroad-highway projects may be accomplished by one of the following methods:

(i) The State or railroad's engineering forces;

(ii) An engineering consultant selected by the State after consultation with the railroad, and with the State administering the contract; or

(iii) An engineering consultant selected by the railroad, with the approval of the State and with the railroad administering the contract.

(2) Where a railroad is not adequately staffed, Federal-aid funds may participate in the amounts paid to engineering consultants and others for required services, provided such amounts are not based on a percentage of the cost of construction, either under contracts for individual projects or under existing written continuing contracts where such work is regularly performed for the railroad in its own work under such contracts at reasonable costs.

(c) *Rights-of-way.* (1) Acquisition of right-of-way by a State highway agency on behalf of a railroad or acquisition of nonoperating real property from a railroad shall be in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 *et seq.*) and applicable FHWA right-of-way procedures in 23 CFR, Chapter I, Subchapter H. On projects for the elimination of hazards of railroad-highway crossings by the relocation of railroads, acquisition or replacement right-of-way by a railroad shall be in accordance with 42 U.S.C. 4601 *et. seq.*

(2) Where buildings and other depreciable structures of the railroad (such as signal towers, passenger stations, depots, and other buildings, and equipment housings) which are integral to operation of railroad traffic are wholly or partly affected by a highway project, the costs of work necessary to functionally restore such facilities are eligible for participation. However, when replacement of such facilities is necessary, credits shall be made to the cost of the project for:

(i) Accrued depreciation, which is that amount based on the ratio between the period of actual length of service and total life expectancy applied to the original cost.

(ii) Additions or improvements which provide higher quality or increased service capability of the facility and which are provided solely for the benefit of the railroad.

(iii) Actual salvage value of the material recovered from the facility being replaced. Total credits to a project shall not be required in excess of the replacement cost of the facility.

(3) Where Federal funds participate in the cost of replacement right-of-way, there will be no charge to the project for the railroad's existing right-of-way being transferred to the State highway agency except when the value of the right-of-way being taken exceeds the value of the replacement right-of-way.

(d) *State-railroad agreements.* (1) Where construction of a Federal-aid project requires use of railroad properties or adjustments to railroad facilities, there shall be an agreement in writing between the State highway agency and the railroad company.

(2) The written agreement between the State and the railroad shall, as a minimum include the following, where applicable:

(i) The provisions of this subpart and of 23 CFR, Part 140, subpart I, incorporated by reference.

(ii) A detailed statement of the work to be performed by each party.

(iii) Method of payment (either actual cost or lump sum),

(iv) For projects which are not for the elimination of hazards of railroad-highway crossings, the extent to which the railroad is obligated to move or adjust its facilities at its own expense,

(v) The railroad's share of the project cost,

(vi) An itemized estimate of the cost of the work to be performed by the railroad,

(vii) Method to be used for performing the work, either by railroad forces or by contract,

(viii) Maintenance responsibility,

(ix) Form, duration, and amounts of any needed insurance,

(x) Appropriate reference to or identification of plans and specifications,

(xi) Statements defining the conditions under which the railroad will provide or require protective services during performance of the work, the type of protective services and the method of reimbursement to the railroad, and

(xii) Provisions regarding inspection of any recovered materials.

(3) On work to be performed by the railroad with its own forces and where the State highway agency and railroad agree, subject to approval by FHWA, an agreement providing for a lump sum payment in lieu of later determination of actual costs may be used for any of the following:

(i) Installation or improvement of grade crossing warning devices and/or grade crossing surfaces, regardless of cost, or

(ii) Any other eligible work where the estimated cost to the State of the proposed railroad work does not exceed $100,000 or

(iii) Where FHWA finds that the circumstances are such that this method of developing costs would be in the best interest of the public.

(4) Where the lump sum method of payment is used, periodic reviews and analyses of the railroad's methods and cost data used to develop lump sum estimates will be made.

(5) Master agreements between a State and a railroad on an areawide or statewide basis may be used. These agreements would contain the specifications, regulations, and provisions required in conjunction with work performed on all projects. Supporting data for each project or group of projects must, when combined with the master agreement by reference, satisfy the provisions of § 646.216(d)(2).

(6) Official orders issued by regulatory agencies will be accepted in lieu of State-railroad agreements only where, together with supplementary written understandings between the State and the railroad, they include the items required by § 646.216(d)(2).

(7) In extraordinary cases where FHWA finds that the circumstances are such that requiring such agreement or order would not be in the best interest of the public, projects may be approved for construction with the aid of Federal funds, provided satisfactory commitments have been made with respect to construction, maintenance and the railroad share of project costs.

(e) *Authorizations.* (1) The costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation. Preliminary engineering and right-of-way

acquisition costs which are otherwise eligible, but incurred by a railroad prior to authorization by the FHWA, although not reimbursable, may be included as part of the railroad share of project cost where such a share is required.

(2) Prior to issuance of authorization by FHWA either to advertise the physical construction for bids or to proceed with force account construction for railroad work or for other construction affected by railroad work, the following must be accomplished:

(i) The plans, specifications and estimates must be approved by FHWA.

(ii) A proposed agreement between the State and railroad must be found satisfactory by FHWA. Before Federal funds may be used to reimburse the State for railroad costs the executed agreement must be approved by FHWA. However, cost for materials stockpiled at the project site or specifically purchased and delivered to the company for use on the project may be reimbursed on progress billings prior to the approval of the executed State-Railroad Agreement in accordance with 23 CFR 140.922(a) and § 646.218 of this part.

(iii) Adequate provisions must be made for any needed easements, right-of-way, temporary crossings for construction purposes or other property interests.

(iv) The pertinent portions of the State-railroad agreement applicable to any protective services required during performance of the work must be included in the project specifications and special provisions for any construction contract.

(3) In unusual cases, pending compliance with §646.216(e)(2)(ii), (iii) and (iv), authorization may be given by FHWA to advertise for bids for highway construction under conditions where a railroad grants a right-of-entry to its property as necessary to prosecute the physical construction.

(f) *Construction.* (1) Construction may be accomplished by:

(i) Railroad force account,

(ii) Contracting with the lowest qualified bidder based on appropriate solicitation,

(iii) Existing continuing contracts at reasonable costs, or

(iv) Contract without competitive bidding, for minor work, at reasonable costs.

(2) Reimbursement will not be made for any increased costs due to changes in plans:

(i) For the convenience of the contractor, or

(ii) Not approved by the State and FHWA.

(3) The State and FHWA shall be afforded a reasonable opportunity to inspect materials recovered by the railroad prior to disposal by sale or scrap. This requirement will be satisfied by the railroad giving written notice, or oral notice with prompt written confirmation, to the State of the time and place where the materials will be available for inspection. The giving of notice is the responsibility of the railroad, and it may be held accountable for full value of materials disposed of without notice.

(4) In addition to normal construction costs, the following construction costs are eligible for participation with Federal-aid funds when approved by the State and FHWA:

(i) The cost of maintaining temporary facilities of a railroad company required by and during the highway construction to the extent that such costs exceed the documented normal cost of maintaining the permanent facilities.

(ii) The cost of stage or extended construction involving grade corrections and/or slope stabilization for permanent tracks of a railroad which are required to be

relocated on new grade by the highway construction. Stage or extended construction will be approved by FHWA only when documentation submitted by the State establishes the proposed method of construction to be the only practical method and that the cost of the extended construction within the period specified is estimated to be less than the cost of any practicable alternate procedure.

(iii) The cost of restoring the company's service by adjustments of existing facilities away from the project site, in lieu of and not to exceed the cost of replacing, adjusting or relocating facilities at the project site.

(iv) The cost of an addition or improvement to an existing railroad facility which is required by the highway construction.

[40 FR 16059, April 9, 1975, as amended at 40 FR 29712, July 15, 1975; 47 FR 33956, Aug. 5, 1982; 62 FR 45328, Aug. 27, 1997]

APPENDIX H

TRANSCRIPT EXCERPT

[35] [000981] on November 8, 1988, and that is the relevant time frame. That's our position.

THE COURT: The Court will take the matter under advisement.

MR. ALLEN: Your Honor, may I . . .

THE COURT: No, I don't want any further. . .

MR. ALLEN: . . . just be heard . . . one . . . one sentence on that issue?

THE COURT: No, I've . . . I've heard all the argument I need to on those motions. Let's move on. Let's take up the Defendant's Motion to Consider (sic) Trial Pending U.S. Supreme Court Decision.

MS. KENYON: Your Honor, I filed that motion based upon the fact that at the core of the Plaintiff's claims in this case, is whether or not their state tort claims are preempted under federal law. This is another issue that was brought up earlier in this case. It went upon appeal. What has happened is both at the state appellate and supreme court levels, as well as at the federal circuit court levels, contrary and conflicting decisions have been handed down. As a result, on this very question of preemption, and whether or not it occurs once funding has been awarded for a particular crossing upgrade, or whether it is not relevant until after the installation and operation of the lights and gates at the crossing, or whether in fact preemption attaches at some [36] [000982] other point in time, is a question that now United States Supreme is going to decide based upon its granting cert. in the *Shanklin* case, a case coming out of the Sixth Circuit Court of Appeals. My understanding, based upon reviewing the Supreme Court website maintained by Northwestern University Law School is that the United States Supreme Court has scheduled this question for oral argument on March 1 of this year, just about a month and a week and a half or so away. That would

indicate, probably in terms of time, that there might be a decision on that in six to eight months, which at this point in this case doesn't seem to be a lot of time, given the fact that this case was filed in 1988 . . . I'm sorry, filed in '90 based upon a 1988 occurrence. In the interest of judicial economy and not dealing with this claim until the Supreme Court has spoken on it, I filed a motion to continue.

THE COURT: The Defendants' Motion to Continue Trial is overruled and denied, and we'll proceed with the trial of the cause.

Let's go to Defendants' Motion to Exclude Dr. Berg, though I suspect I've heard some of that argument already.

MS. KENYON: That's correct, Your Honor, you have. The motion to exclude Dr. Berg is based largely on the mandates of *Daubert v. Merrell Dow Pharmaceuticals,* and you already, I think, probably heard enough with regard to his

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No. 01-1212

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILWAY COMPANY,
Petitioner,

v.

TAMERA LEE KAPITAN, Special Administratrix
of the Estate of RUDOLPH J. KAPITAN,
Respondent.

On Petition for a Writ of Certiorari to the Indiana Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed pursuant to Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

Amicus curiae AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak, the national intercity passenger railroad company. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great

[1] The letter expressing consent has been filed with the Clerk of the Court.

significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

AAR often participates as *amicus curiae* in cases which raise issues related to implementation of the Federal Grade Crossing Safety Program. 23 U.S.C. § 130. Under this law, and the regulations promulgated thereunder, Congress and the Secretary of Transportation established a uniform, nationwide, data-driven program for addressing hazards at rail-highway grade crossings, which requires states to identify crossings in need of safety improvements, and, with the assistance of federal money, to implement crossing improvement projects on a priority basis. AAR filed *amicus* briefs in two cases before this Court which addressed the role of railroads in the Federal Program, and the interplay between the Federal Program and state tort law which purports to regulate grade crossing safety. *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

The respective spheres of federal and state law in regulating crossing safety, and in particular the adequacy of rail-highway grade crossing warning devices, have been clearly delineated by this Court. The ruling below is of great concern to railroads because its holding attempts to evade this Court's prior holdings that the installation of crossing warning devices results in the preemption by federal law of state law duties with respect to the adequacy of such devices. Alternatively, the decision below may be read as presenting an issue arising under the Federal Program that has not been directly addressed by prior decisions of this Court, but that has been dealt with in varying ways by lower courts. As a result, railroads across the nation, which participate in the

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[2] *E.g., National Railroad Passenger Corp. v. Griesser*, 122 S.Ct. 386 (2001); *Kansas City Southern Railway Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 S.Ct. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

upgrade of hundreds of crossings each year under the Federal Program, cannot be sure of their obligations during the pendency of those projects. Railroads continue to face a large number of lawsuits in which the plaintiff asserts claims, based on state law, alleging that the crossing was equipped with inadequate warning devices. Thus, because this case presents an important issue which is likely to be faced by railroads with regularity, AAR seeks to file an *amicus curiae* brief.

When AAR participates in a case as *amicus curiae* it brings a broad, industry-wide perspective to the issues before the court. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In addition to participating in numerous crossing cases as *amicus*, AAR has had a long-standing involvement with the Federal Program, including its work with the U.S. Department of Transportation (initiated prior to the Program's inception) to compile a grade crossing inventory, which serves as an important source of information for use in implementation of the Federal Program by federal and state authorities. Thus, AAR is thoroughly familiar with the issues that arise with regularity in crossing cases and their impact on the railroad industry.

For these reasons, AAR respectfully requests that leave to file the attached *amicus curiae* brief be granted.

Respectfully submitted,

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April 19, 2002

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IN THE

Supreme Court of the United States

No. 01-1212

GRAND TRUNK WESTERN RAILWAY COMPANY,
Petitioner,

v.

TAMERA LEE KAPITAN, Special Administratrix
of the Estate of RUDOLPH J. KAPITAN,
Respondent.

On Petition for a Writ of Certiorari to the Indiana Court of Appeals

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. One such matter

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

is grade crossing safety and litigation resulting from accidents between trains and motor vehicles at grade crossings when it raises issues that may significantly impact the railroad industry.

Lawsuits arising out of grade crossing accidents have a significance beyond just the financial exposure faced by the defendant; this litigation also can serve as a forum for establishing the roles and responsibilities of various parties with respect to grade crossing safety. Typically, grade crossing suits include claims that the railroad negligently failed to provide adequate warning devices at the crossing. These claims have brought into focus the interplay between state common law rules related to crossings and the role of the federal government in grade crossing safety. Twice during the past decade, this Court has addressed that relationship and its impact on state tort law. *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

AAR filed *amicus* briefs in both *Easterwood* and *Shanklin*, in which this Court addressed the question of when the Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971, and regulations issued by the Secretary of Transportation which implemented the Federal Grade Crossing Safety Program, preempt state-law duties, including tort claims alleging that the railroad negligently failed to determine the need for, and install, adequate warning devices. In those cases, this Court held that with respect to all crossings at which federal funds have participated in the installation of crossing warning devices, state law duties to select and install adequate warning devices are preempted by federal law. However, this Court has yet to address the question of what point during a federally funded crossing improvement project federal law displaces state law. Since *Easterwood* was decided, lower courts have answered this question in divergent ways. This lack of uniformity has

created great uncertainty regarding the role and duty of railroads with respect to grade crossing warning devices.

As of 2000, there were 155,370 public grade crossings on the nation's rail system. Federal Railroad Administration, *Railroad Safety Statistic Annual Report 2000*, 116, Table 9-1 (July 2001). Because grade crossings have such a pervasive presence on the rail network, the establishment and preservation of clear and uniform rules regarding the duty of the various entities with an interest in highway/grade crossing safety to determine the need for and to install adequate warning devices at crossings is a matter of great importance to AAR's member railroads.

Inasmuch as preemption in the context of grade crossing litigation has remained an important and recurring issue facing railroads, AAR has maintained a continuing interest in the uniform interpretation and application of the *Easterwood/ Shanklin* decisions by lower courts.[2] AAR can play a valuable role in bringing to this Court's attention the railroad industry's perspective on the issues raised by this important case.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of petitioner

SUMMARY OF THE ARGUMENT

Just as was the case in *Shanklin*, in this case passive warning devices where installed with federal funds at the crossing where the accident took place. Therefore, the lower court's holding that state law duties to select and install adequate warning devices were not preempted is inconsis-

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[2] For example, AAR is participating as *amicus curiae* in a case pending before the Ohio Supreme Court in which the plaintiff has argued that preemption did not apply to a crossing where warning devices were installed with federal funds because the devices were "experimental." *Bonacorsi v. Wheeling & Lake Erie R.R.*, 2000 WL 1679516 (Ohio App. 2000), *discretionary appeal allowed*, 744 N.E.2d 1196 (2001).

tent with this Court's precedent and should be summarily reversed.

In order to avoid a direct conflict with *Shanklin*, the lower court's opinion must be construed as reading *Shanklin* as holding that state law duties continue to apply until all mandated devices in a federal grade crossing improvement project have been completely installed. *Shanklin* did not so hold: however, the issue of when preemption applies during the course of a federal crossing project has been subject to varying interpretation by lower courts. Railroads have a strong interest in the establishment of a uniform rule on this issue because the spilt among the lower courts means that railroads are subject to differing duties at different times depending on the location of a crossing on their lines.

The lower court has held that railroads have continuing state law duties to select and install adequate warning devices at a time when the railroad has no decisionmaking authority, and its role, if any, is limited to that of a contractor fulfilling a contract with the state which is subject to the requirements of federal regulations and approval by the federal government, as is the entire process of implementing a federally-funded crossing upgrade. The lower court's ruling is inconsistent with the underpinnings of this Court's holdings that once decisionmaking authority over a crossing has shifted to the Secretary of Transportation, state law duties to select and install devices are preempted.

ARGUMENT

I. THIS CASE IS INDISTINGUISHABLE FROM *SHANKLIN* AND SUMMARY REVERSAL IS WARRANTED

As petitioner points out, this case is factually indistinguishable from *Shanklin*. That opinion makes clear that preemption under the federal regulations at 23 C.F.R.

§ 646.214(b)(3) & (4) apply equally to passive crossing warning devices as they do to active devices. Reiterating its *Easterwood* decision, the *Shanklin* Court explained that "§§ 646.214(b)(3) and (4) pre-empt state tort claims concerning the adequacy of *all* warning devices installed with the participation of federal funds." 529 U.S. at 357. (emphasis in the original) It is undisputed that at the time of the accident in this case passive warning devices–specifically, stop signs–had been installed with federal funds. Thus, the Indiana Court of Appeals was incorrect when, choosing to ignore or overlook the installation of the stop signs and deny preemption, it concluded that federally funded warning devices *"were not yet operational* at the time of" the accident.[3] (emphasis in the original) Because the lower court's decision is in direct conflict with this Court's decision in *Shanklin*, summary reversal is warranted.

II. THIS COURT SHOULD RESOLVE THE DISAGREEMENT AMONG THE LOWER COURTS OVER WHEN FEDERAL LAW BECOMES APPLICABLE TO A CROSSING IMPROVED WITH FEDERAL FUNDS

A. The Issue Raised by the Ruling Below, Which Was Not Addressed by *Easterwood* or *Shanklin*, Can Impact Numerous Grade Crossings

Part II of the Petition raises an issue of importance to the entire railroad industry which has yet to be addressed by this

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[3] The Indiana court's failure to consider the installation of stop signs with federal funds to be preemptive under *Shanklin* in insupportable given that under Indiana law stop signs posted at railroad crossings are clearly intended to alert approaching motorists to the crossing and affect their behavior. *See* Indiana Code Annotated § 9-21-4-16.

> When a stop sign is erected at a railroad crossing, the driver of a vehicle shall stop within fifty (50) feet but not less than ten (10) feet from the nearest track of the grade crossing and shall proceed only upon exercising due care.

Court, and on which lower courts have not forged a consistent, uniform rule. In order to reconcile its discounting of the federally funded stop signs in its preemption analysis with the precedent of this Court, the Indiana Court of Appeals construed *Shanklin*'s holding as grounded on the proposition that preemption does not apply to a crossing which is the subject of a federally funded crossing upgrade project until installation of every warning device within the project's scope has been completed. Although the court below referred to language in the *Shanklin* opinion as supporting its decision, the question of the point in time during a federally funded upgrade project when preemption is triggered was neither raised nor briefed in *Shanklin*, inasmuch as there was no dispute over whether the installation of the warning devices at the crossing in that case had been completed. The issue raised by the Indiana court's construction of *Shanklin* is fundamental to the question of federal preemption in the area of crossing safety and impacts every crossing that comes within the purview of the Federal Grade Crossing Program. 23 U.S.C. § 130.

Under *Easterwood*, preemption of state law occurs when federal standards, promulgated under the Federal Program, displace state standards for determining the adequacy of crossing warning devices.[4] Under the Federal Program, the

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[4] With the advent of the automobile and the growth and expansion of the national highway system, the federal government undertook a role in crossing safety, beginning in 1916 and culminating with the inception of the Federal Program in 1973. [*See* Petition pp.3-7]. For many years, there was no uniform system for determining the need for warning devices at railroad grade crossings despite the well-recognized interstate character of rail operations. However, recognizing that grade crossing accidents were a serious problem demanding a national solution, in 1973 Congress and the Secretary of Transportation created the Federal Grade Crossing Safety Program with the passage of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282 (codified at 23 U.S.C. § 130), which for the first time created a nationally uniform system for surveying railroad grade crossings and determining the need for warning devices at those crossings.

federal government has established criteria, through regulations adopted by the Federal Highway Administration (FHWA), for adequate crossing warning devices. 23 CFR § 646.214(b)(3) & (4). These regulations set forth the crossing characteristics that require lights and gates (absent a recommendation to the contrary by a diagnostic team) and, where those characteristics are not present, make the determination of the type of warning devices to be installed subject to federal approval. By their terms, these regulations are applicable whenever federal funds participate in the installation of crossing warning devices. When they are applicable, the federal standards established by the regulations preempt any state law, including common law, which purports to establish an independent duty to select and install adequate warning devices at grade crossings. *Easterwood*, 507 U.S. at 670-71. Preemption under these circumstances flows from Congress' express intention to preempt state laws relating to rail safety whenever the Secretary of Transportation issues a regulation covering the subject matter of that state law. 49 U.S.C. §20106.

Despite the straightforward holding in *Easterwood*, some courts proved reluctant to give that decision its full effect.[5] This reluctance led to a deep split among the federal courts of appeals and resulted in this Court reconsidering the issue in *Shanklin*, a decision which simply reaffirmed the holding in *Easterwood*, albeit in somewhat more explicit terms. *Shanklin* disabused the lower courts of the notion that preemption does not apply where only so-called minimal signs are installed, where evidence is proffered to show that the federal regulations called for installation of different devices than were actually installed, or where evidence is not presented that the Secretary of Transportation issued an

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[5] *See Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994)(declining to read the *Easterwod* decision "literally.") and *Shanklin v. Norfolk Southern Ry. Co.*, 173 F.3d 386 (6th Cir. 1999), *rev'd*, 529 U.S. 344 (2000).

individualized approval of a particular device. Despite its clarity on those questions, *Shanklin* did not address–because the issue was not raised–the disagreement among the lower courts over the point in time at which preemption is triggered. [*See* Petition pp.17-19]

Because the major railroads operate in many states over a large number of crossings, they have a strong interest in uniform application of the laws which impact their obligations at grade crossings. Just as the pre-*Shanklin* split over whether federal funding is the only necessary precondition for preemption led to non-uniform application of federal law, today, there is no uniform rule which establishes the point during the crossing improvement process at which federal, as opposed to state, law governs the subject of the adequacy of warning devices. Each year hundreds of crossing improvement projects are commenced nationwide under the Federal Program, and the question raised by this case is relevant to each and every one of those projects.[6] Therefore, resolving the question of when preemption is triggered is of great importance to railroads.

The significance of the quandary presented by this issue is illustrated by the two large railroads operating in the western part of the nation, the Burlington Northern Santa Fe and the Union Pacific. Each railroad operates in states included in the Tenth and Eighth circuits. In the states of the Tenth Circuit, preemption of state law occurs when, after committing itself to a crossing upgrade project, the federal government "expends significant federal resources on such a project." *Hatfield v. Burlington Northern R.R.*, 64 F.3d 559, 562 (10th Cir. 1995).[7] In *Hatfield*, the federal government's

[6] Two major railroads reported that during the five year period from 1997 through 2001, over 2000 crossing upgrade projects have been authorized under the Federal Program at crossings on their lines.

[7] Even in the Tenth Circuit, if a claim is adjudicated in state court in Oklahoma, a different result will obtain than if the same claim is heard in

authorization of preliminary engineering and selection of devices for the crossing, along with the expenditure of just over $600 for the preliminary engineering services, was sufficient to trigger preemption. In contrast, in the states of the Eighth Circuit, state law duties apply until "all the devices prescribed in the FHWA-approved upgrade plan are installed and operating." *St. Louis Southwestern Ry. Co., v. Malone Freight Lines*, 39 F.3d 864, 867 (8th Cir. 1994), *cert denied*, 514 U.S. 1110 (1995).[8] Thus, crossings on the lines of these two large railroads are governed by different rules, and the railroads' obligations with respect to their crossings will differ, depending on the state or federal circuit in which they are located.

B. The Indiana Court's Misreading of *Shanklin* Puts an Untenable Burden on Railroads and is Inconsistent With the Federal Regulatory Scheme

The decision below creates an untenable situation for railroads because it has the effect of continuing in force state law obligations to select adequate warning devices well beyond a time when the railroad has any discretion whatsoever in the decisionmaking process. At the time of the accident in this case, the crossing had become subject to decisions made by the state authorities in accordance with federal regulations

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federal court. *Akin v. Missouri Pac. R.R.*, 977 P.2d 1040 (Okla. 1999) (declining to follow *Hatfield*).

[8] While the holding in *Malone* is premised on the Eighth Circuit's notion that the public is not protected until installation of the warning devices is complete: "[a] plan to install devices and federal approval of a plan do not protect the public," 39 F.3d at 867, it fails to consider or address the regulations at 23 C.F.R. § 646.216(d)(2)(xi) and (e)(2)(iv) which *"cover the subject matter"* of interim protection during grade crossing improvement projects, thereby preempting state law claims regarding the adequacy of warning devices during the pendency of the project. *See* Petition at 21-22.

and subject to federal oversight. Even if the railroad had made a judgment that the project should have been carried out differently, it simply had no control over the decisionmaking process. The trial court in this case confirmed that the railroad had neither the duty nor authority to close the road until the project was completed. [*See* Petition at 22-23].

The role of the railroad is limited under the Federal Program, and any putative discretion to act independent of the Program vanishes once the process of upgrading a crossing has begun.[9] Federal law requires each state to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. §130(d). The process by which the states identify crossings which are hazardous, and develop and prioritize safety improvement projects, is subject to regulations at 23 C.F.R. Part 924, which require that implementation of federally funded crossing projects be undertaken on the basis of relative hazard ranking (to ensure that the potentially more dangerous crossings are upgraded first). *Id.* at §§ 924.9 & 11(a). As part of that ongoing process, railroads are to provide the state with data related to its train operations.[10] After identifying a crossing as a

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[9] During the process of revising the Manual on Uniform Traffic Control Devices, the Highway Administration explained that "[t]he FHWA and the Federal Railroad Administration have reviewed Federal law, regulations and guidance and found that although they encourage voluntary railroad involvement (as members of diagnostic teams where federal funds are involved) in the analysis of need for and type of protection, they do not impose on railroads the responsibility to make, or share in making, determinations of need for or selection of traffic control devices." Federal Highway Administration, *National Standards for Traffic Control Devices; Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD)*, 65 Fed. Reg. 78923, 78947 (Dec. 18, 2000).

[10] *See* U.S. Dept. of Transp., *National Railroad-Highway Crossing Inventory Update Manual* C-3 (1976).

candidate for possible upgrade, based on its survey, the state typically will convene a diagnostic team, which usually will include a representative of the railroad. As a result of a diagnostic review, a crossing may be placed on a state's schedule for upgrades. States must submit their schedule of projects to the federal government for approval.

When a crossing improvement project is submitted for federal funding, "[t]he costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation." 23 C.F.R. § 646.216(e)(1); *id.* 140.904(b). Typically, in each project involving active devices, the state will notify the railroad that a federally funded project is to be undertaken and authorize the railroad to provide preliminary engineering services and cost estimates for installation of the warning devices, *see id.* § 646.216(b)(1), usually accompanied by an express prohibition against doing anything further. The state will submit the input received from the railroad to FHWA. If the FHWA approves the preliminary plans, the state will prepare a contract covering the installation of the devices. *See id.* § 646.216(d). The contract for installation of the devices must comply with certain federal requirements and be approved by the federal government. *See id.* at § 646.216(d)(2) & (e)(2)(ii). With a federal go-ahead secured, the state also must authorize the acquisition of the traffic control devices and other materials. Once this is accomplished, upon FHWA authorization, the state will advise the railroad that it may proceed with construction. The final stage of the project is an on-site inspection by FHWA and the state. Federal funds participate in the installation of devices whether they are installed by the railroad or (as here, in regards to the passive devices) by another contractor. *Id.*

646.216(f).[11] The railroad or other contractor is reimbursed for services and materials in accordance with the terms of the contract by the state, which in turn seeks reimbursement from the federal government.

Not only is the Indiana court's reading of the law unfair to the railroad, it fails to take into account the operation of the federal regulatory scheme. Once the state makes a decision to install warning devices under the Federal Program–a decision that must be made pursuant to federal law and subject to the approval of the federal government–the railroad's role is simply to fulfill its obligations under the contract. By federal regulation, that contract must specifically provide, subject to FHWA approval, what protective services (which may include interim devices like stop signs) will be deployed during the installation process. 23 C.F.R. §§ 646.216(e)(2)(iv); 140.916. The decision below, however, is premised on the illogical notion that during the course of installation of warning devices the railroad maintains a state law duty (regardless of the contract) with respect to the adequacy of the warning devices at the crossing up until the time the very last wire, bolt and rivet of each device has been soldered or drilled into place.

Though not directly addressed, the prior decisions of this Court provide the analytical framework for determining the point during a Federal-aid grade crossing improvement project when preemption of state law occurs. In identifying § 646.214(b)(3)&(4) as regulations which cover the subject matter of the adequacy of warning devices, this Court explained that these regulations "displace state and private

[11] Usually, but not always, the railroad serves as the contractor to perform the work. The railroad is the logical candidate for this role, especially when active warning devices are to be installed, largely because the train detection circuitry in the rails, an essential part of any active device, must by synchronized with the railroad's signal and train control systems.

decisionmaking authority by establishing a federal-law requirement" with regard to warning devices. *Easterwood*, 507 U.S. at 670; *Shanklin*, 529 U.S. at 353. This Court further explained that in projects where federal funds participate, "the Secretary has determined the devices to be installed and the means by which the railroads are to participate in the selection." *Easterwood* at 671.

This Court's decisions focus on the shifting of authority over the crossing from the state (and state rules of law allocating responsibility) to the federal government. The transfer of decisionmaking authority over warning devices to the Secretary occurs "on any project where Federal-aid funds participate in the installation of the device," § 646.214(b)(3)(i), and the regulations could not be clearer that federal funds participate in the installation of devices whenever the contractor performs "preliminary engineering, right of way acquisition, [or] construction . . . after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA . . ." 23 C.F.R. § 646.216(e)(1). As the court in *Hatfield* explained: "when the [federal] government committed to preliminary engineering–both the financing of the improvement project and its direction and control were removed from [the railroad]." 64 F.3d at 562. The test established in *Hatfield* is designed to identify the point in time when the actions of the federal government manifest "a clear intent to require a federally approved warning device at the crossing in question." *Id.* Other courts have also focused on the question of where the decisionmaking authority lies. "The issue is not *what* warning system the federal government determines to be necessary, but whether the final authority to decide what warning system is needed has been taken out of the railroad's and the state's hands under 23 C.F.R. 646.214(b)(3) & (4)." *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188, 1192 (10th Cir. 1996). "[B]y approving and funding grade crossing improvements, the

FHWA replaces state common law standards for measuring the adequacy of warning devices with its own regulations. . . . it is the identity of the decision-maker and not the accuracy of the decision that determines preemption." *Powers v. CSX Transp., Inc.*, 97 F.Supp.2d 1297, 1303 (S. D. Ala. 2000).

The case law underscores the notion that the key event is the ceding of control over the crossing to federal authority. In a number of cases, plaintiffs have argued that when passive devices have been installed under the Federal Program, a subsequent (yet unimplemented) determination that active devices are needed results in the elimination of any pre-emptive effect the passive devices carried. This view of preemption has been rejected unequivocally, notwithstanding the contention that a subsequent decision to upgrade the crossing indicates that the existing devices are no longer adequate under federal standards to "protect" the public. "[W]hether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the preemption question." *Shanklin*, 529 U.S. at 359. *See also Bock v. St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 923 (8th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000). The court in *Powers* noted that "[r]egardless of how many times the FHWA approves additional or replacement warning devices at a crossing, it is still the FHWA making the selection decision." 97 F.Supp.2d at 1304. Similarly, in *Union Pac. R.R. v. Sharp*, 952 S.W.2d 658 (Ark. 1997), the Supreme Court of Arkansas rejected the argument that the need for additional devices at a crossing should affect the preemption analysis because it "ignores the fact that the regulations have stripped the railroad of any decision-making authority to determine what type of warning devices are needed at a particular intersection, and placed such authority in the FHWA." *Id.* at 667.

The lower court's ruling cannot be reconcile with either the federal regulatory scheme or this Court's reasoning in *Easterwood* and *Shanklin*. The court below would have

regulations which cover the duty to *select* proper devices become applicable only after the devices have already been selected and fully installed pursuant to federal law, but they would not apply during the pendency of the very process they cover. Practical considerations, as well as the need to comply with the steps set forth in the federal regulatory scheme (outlined above), dictate that some period of time will elapse between the initial decision to commence a federally funded crossing upgrade project and complete installation of all mandated devices. The complexity of the roadway and tracks at the crossing, and the configuration of nearby traffic signals, as well as the availability of electricity needed to operate the devices (including the possible need to negotiate with a local power company), all are variables that affect the timing of a project. In addition, lead time is needed to order signals and other hardware, and to schedule labor and equipment for the construction. Another factor affecting project implementation is that the state is likely to be simultaneously dealing with other railroads on other projects, while the railroad too is involved in other projects with agencies in other states.

For these very reasons the federal government has not left a void, but rather has comprehensively regulated the installation process, including the subject of interim protection. *See supra* at 11-12. Moreover, if a state determines that because of the potential dangerousness of a particular crossing[12] time is of the essence for completion of a project, it can require, in its contract with the railroad, completion by a date certain. If the railroad is not able to meet that requirement, another contractor may be sought.

The approach sanctioned by the court below would create the anomalous situation where, on the one hand, the railroad

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[12] A state can determine dangerousness on the basis of the USDOT Grade Crossing Accident Prediction Equations, a highly complex set of formulae described in the U.S. Dept. of Transp. *Railroad-Highway Grade Crossing Handbook* at 70-76 (2d ed. 1986).

may have entered into an agreement with a state regulatory agency governing the railroad's role with respect to the installation project, while simultaneously, on the other hand, the state, through its judiciary, may be imposing an independent duty on the railroad to select and install warning devices at the very same crossing. Even if the railroad is not the contractor selected to install the devices, the same impossible situation occurs, inasmuch as an agreement to which one arm of the state is a party would be in effect to upgrade a crossing in a certain way, while at the same time a different arm of the state could determine that a third party (the railroad) had a continuing duty to upgrade the very same crossing. It is ludicrous to take the position that during the relatively short time between the installation of the stop signs and the installation of the active devices–both of which were paid for with federal funds–the federal regulations which govern the adequacy of crossing warning devices did not apply to the Hendricks Street crossing. It is even more ludicrous to suggest that during that period, the railroad, at the time a contractor to the state to install the devices, somehow maintained a state law duty to exercise decision-making authority with respect to selection of warning devices at the crossing. The lower court's preemption analysis here, or lack thereof, simply cannot withstand scrutiny.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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v.

TAMARA LEE KAPITAN, Special Administratrix
of the Estate of RUDOLPH J. KAPITAN,
Respondent.

On Petition for a Writ of Certiorari
to the Indiana Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this case, a jury found the defendant railroad liable for damages on the ground that its negligence caused a grade-crossing collision in which the plaintiff's husband died. The question presented is:

> Should this Court grant review to decide whether, in an unpublished ruling, the Indiana Court of Appeals erred in holding that plaintiff's state law claim is not preempted by the Federal Railroad Safety Act where, at the time of the accident:
>
> (1) a grade-crossing improvement project that included flashing lights and gates had been approved by the Federal Highway Administration but the lights and gates were not yet "installed and operating," *Norfolk Southern Railway v. Shanklin*, 529 U.S. 344, 354 (2000); and
>
> (2) federal funds had been "committed" to the project, but there is no evidence that any federal funds had actually been spent.

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REGULATION

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RULE

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STATEMENT OF THE CASE

On November 6, 1988, one of petitioner's trains collided with a car driven by Ruldolph J. Kapitan at the Hendricks Street crossing in Merrillville, Indiana. Mr. Kapitan died as a result. Barely two months before the accident occurred, on August 1, 1988, the Federal Highway Administration (FHWA) had approved an upgrade project at the Hendricks Street crossing that was required to include both additional signs and automatic gates and flashers. At the time of the accident, the gates and flashers had not yet been installed.

Respondent Tamara Lee Kapitan, special administratrix of the estate of Rudolph Kapitan, filed suit in 1989 alleging that the railroad was negligent because it failed, among other things, to provide adequate warning devices at the crossing, including flashing lights and gates. The trial court granted summary judgment to petitioner, finding that Kapitan's inadequate-warning claim was preempted by the Federal Railroad Safety Act (FRSA) as of August 1988 when the upgrade project was approved by the FHWA.

Kapitan took an interlocutory appeal and the Indiana Court of Appeals reversed. In its unpublished 1997 opinion, the court held that respondent's claim was not preempted because the FHWA-approved devices were not actually installed and operating at the time of the accident.

In February 2000, a jury returned a verdict in favor of Kapitan. The jury determined that the railroad was fifty percent at fault. Total damages of $5,109,080 therefore resulted in a verdict of $2,554,740 for Kapitan. In another unpublished opinion, the court of appeals affirmed, again rejecting petitioner's preemption defense. The Indiana Supreme Court denied review.

REASONS FOR DENYING THE WRIT

Petitioner asserts that review should be granted on the ground that the decision below is inconsistent with this Court's precedent and because the decision below creates a conflict with the Tenth Circuit. Neither assertion is correct.

I. The Decision Below is Consistent with *Shanklin* and *Easterwood.*

In an attempt to create a conflict between the Indiana Court of Appeals and this Court's holdings in *CSX Transportation v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway v. Shanklin*, 529 U.S. 344 (2000), petitioner distorts the facts and the holding below. Petitioner implies that the crossing upgrade should be seen as two distinct projects, one for passive devices and another for active devices, the former having been installed and, petitioner claims, federally funded at the time of the accident. There are two problems with this view. First, the Hendricks Street crossing upgrade was approved by the FHWA as a single project that included signs as well as flashing lights and gates. Second, there is no evidence that *either* the signs or the lights and gates were paid for with federal funds until after the accident.

The trial court did not find "*as an uncontested fact that federal funds had participated in the installation of the stop signs and pavement markings at the Hendricks Street crossing.*" Pet. 11 (emphasis in original). What the trial court actually found, in its now-reversed order granting summary judgment to petitioner, is that the FHWA had approved the Hendricks Street crossing, thereby "*obligating* federal funds to pay for the project." C.A. App. 214-15 (emphasis added). Petitioner simply equates the finding that federal funds were "obligated"

for the project, or "committed" to the project, Pet.App. 8, with federal funds having "participated" in the project. But petitioner never explains how the funds "committed" or "obligated" are different from the "earmarked" funds in *Easterwood* 507 U.S. at 673, which had been "set aside," *id.* at 671, such that funds here participated in federal funding while the funds in *Easterwood* did not so participate. *Id.* at 672. Although federal funds may have been "obligated" or "committed" to the project, the federal funds were not actually disbursed until after the accident. In fact, the trial court included, among the very same list of uncontested facts from which petitioner draws support for its position, that "the project was completed and payments made *after* the collision occurred." C.A. App. 215 (emphasis added).

The court of appeals' holding that FHWA approval but nothing more is not sufficient to trigger preemption is not only consistent with *Easterwood*, it is compelled by that case. In *Easterwood*, as here, a project had been approved, and funds were "earmarked" for a crossing gate. 507 U.S. at 673. Of course, the project in *Easterwood* was abandoned, *id.* at 672, while the Hendricks Street project was eventually completed after the accident took place, but the ultimate completion makes no difference as to whether federal law preempted state law *at the time of the accident*; in both cases, the planned-for, federally-funded devices were not yet in place.

Petitioner complains that the Indiana Court of Appeals has not followed *Shanklin* and "simply ignored the fact that there were federally funded (and fully installed) warning devices at the crossing at the time of the accident." Pet. 11. This characterization overlooks two crucial differences between this case and *Shanklin*. First, in *Shanklin*, the plaintiff unsuccessfully argued that active devices were mandated by

federal law even though the FHWA had approved a project involving warning signs and crossbucks, which were in place at the time of the accident. The Court held that "[once] the FHWA approved the project and the signs were installed using federal funds, the federal standard for adequacy displaced [State] statutory and common law addressing the same subject." 529 U.S. at 359. Here, by contrast, the FHWA approved a grade crossing project at Hendricks Street that included flashing lights and gates, and the railroad seeks to escape liability even though those devices were not installed at the time of the accident and federal funds had not yet been spent.

The second difference between this case and *Shanklin* is that, although petitioner asserts the passive warning devices that were in place at the Hendricks Street crossing at the time of the accident were "federally funded," that is not in the record. Here, funds were "committed" for the project, Pet. App. 8, but there is no evidence that federal funds had yet been actually expended at the time of the accident. Indeed, as noted above, the trial court found that payment for the project occurred after the accident. C.A. App. 215. Petitioner did not challenge this finding before the court of appeals. It argued that the signs and pavement markings in place at the time of the accident "were installed with federal funds and as part of a FHWA-approved project." Brief of Appellant in *Grand Trunk Western Railway Company v. Kapitan*, at 34-35, No. 37A03-0004-CV-140 (Ind. Ct. App. Aug. 11, 2000). Petitioner did not argue that federal funds were actually spent before Kapitan's accident. By contrast, in *Shanklin*, the state department of transportation had installed the required signs in 1987 with federal funds, and the accident occurred in 1993. 529 U.S. at 350.

Petitioner concedes that the Indiana Court of Appeals "did cite language" from *Shanklin* to the effect that preemption

of state-law remedies occurs only after the federally-approved and funded devices are installed and operating. Pet. 20. Indeed, the court below pointed to the following language in *Shanklin*:

> [O]nce the FHWA has funded the crossing improvement *and the warning devices are actually installed and operating*, the regulation "displace[s] state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained."

Pet. App. 9a (quoting *Shanklin*, 529 U.S. at 354 (quoting *Easterwood*, 507 U.S. at 670)).

Petitioner dismisses the conclusion of the court below by trying to distinguish *Shanklin*:

> *Shanklin* cannot be read to have reached out to resolve an issue and a circuit conflict that were not presented and were not briefed: namely, the application of FRSA pre-emption to mid-project collisions. The passive devices at issue in *Shanklin* had been fully 'installed' and 'operating' long prior to the accident. Pet. 20.[1]

Although *Shanklin* did not involve a mid-project collision, the premise that completed installation is necessary to trigger preemption appears throughout this Court's opinion. *E.g.*, 529 U.S. at 357 ("When the FHWA approves a crossing

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[1]The concession that *Shanklin* did not resolve the mid-project collision issue belies petitioner's assertion that the decision below is so unmistakably incorrect as to support summary reversal.

improvement project and the State *installs* the warning devices using federal funds, [that] displaces state tort law addressing the same subject.") (emphasis added); *id. at* 353 ("The sole question in this case ... is whether §§ 646.214(b)(3) and (4) 'are applicable' to all warning devices *actually installed* with federal funds." (emphasis added)); *id.* at 356 (referring to "devices *installed* under a so-called 'priority' or 'hazard' program") (emphasis added). The same premise appears in *Easterwood.* 507 U.S. at 672 ("These facts do not establish that federal funds 'participated in the installation of the [warning] devices' ... The only equipment *installed* was the motion-detection circuitry.").

Petitioner asserts that preemption logically occurs at "the beginning, rather than the end" of a FHWA-approved project and that "[i]t simply makes no sense to hold, in a project governed by federal pre-emption law that sets the standard for the *selection* of warning devices, that pre-emption of state law regarding the *selection* of warning devices does not occur until after the devices are actually 'installed and operating.'" Pet. 19. To the contrary, it makes perfect sense that preemption would not occur until the approved devices are installed and operating, since the public derives the protection of these devices only when they are actually in place. Under petitioner's rule, by contrast, "the public would be unprotected by either state or federal law for the period between federal approval and actual warning device installation." *Thiele v. Norfolk & Western Ry*, 68 F.3d 179,184 (7th Cir. 1995); *see also St. Louis Southwestern Ry. v. Malone Freight Lines*, 39 F.3d 864, 867 (8th Cir. 1994) ("To encourage prompt installation of federally prescribed warning devices, a railroad's common-law duty of care must continue until those devices are installed"); *Akin v. Missouri Pac. R.R.*, 977 P.2d 1040, 1053 (Okla. 1998) ("We do not believe that Congress intended for a no man's land to exist at grade crossings ... during which the public is protected

neither by the federally *mandated or* approved warning devices nor by judicial recourse for injuries sustained by their absence.") (emphasis in original).

Petitioner also argues that a regulation concerning the content of construction contracts, 29 C.F.R. § 646.216(e)(2)(iv), and a related reference in the FHWA's *Manual on Uniform Traffic Control Devices*, demands preemption of respondent's state-law claim after commencement of a project but before the planned crossing protection is installed and operating. Pet. 21-22. Petitioner's argument misses the mark. First of all, *Easterwood* specifically held that the *Manual* does not have preemptive effect. 507 U.S. at 669. Moreover, section 646.216(e)(2)(iv) does not, as petitioner asserts, deal with interim protection nor does it purport to place the federal government in exclusive control over project completion. Indeed, the regulation refers neither to safety nor to devices, but states only that protective "services" — referring to *labor* employed on federally-funded projects — must be included in the contract specifications between the railroad and the State. The regulation does not concern the point at which federal preemption is triggered and, not surprisingly, no federal case (including the Tenth Circuit cases upon which petitioner relies) so much as mentions the regulation. In any event, because, as noted above, the record contains *no* evidence that *any* federal funds were actually expended at the Hendricks Street crossing prior to the crash that killed Rudy Kapitan, the question whether the regulation may have preemptive effect is irrelevant to this case.

II. Contrary to Petitioner's Assertion, the Decision Below Does Not Conflict with Decisions of the Tenth Circuit.

Petitioner manufactures a non-existent split between the unpublished opinion below and the Tenth Circuit. The asserted conflict is based on a decision in which, prior to *Shanklin,* the Tenth Circuit took the view that state-law inadequate-warning claims are preempted by the FRSA at the point where there is an "actual expenditure of federal resources of more than a casual or de minimis nature" on the installation of a warning device. *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188, 1190 (10th Cir. 1996). Even ignoring that the Indiana Court of Appeals is not a state court of last resort, *see* S. Ct. Rule 10(b), this supposed conflict provides no basis for review. First, the Tenth Circuit decision pre-dates *Shanklin.* Respondent is not aware of, and petitioner does not cite, any decision from the Tenth Circuit, or any other court, that post-dates *Shanklin* and is consistent with petitioner's reading of *Armijo.* This is important because, as noted above, *Shanklin* contemplates that preemption is not triggered until "the FHWA has funded the crossing improvement and the warning devices are actually installed and operating." 529 U.S. at 354. The Tenth Circuit will surely have the opportunity to re-consider its position in light of *Shanklin.* In the meantime, there is no reason to grant review.

Petitioner attempts to evade *Armijo's* pre-*Shanklin* pedigree by suggesting that *Armijo* was endorsed by this Court. *Armijo* was among the cases cited by *Shanklin* as presenting the conflict resolved in that case. *See* 529 U.S. at 351-52. Petitioner asserts that, because this Court "adopted the Tenth Circuit approach to the issue of whether passive devices could trigger pre-emption," *Shanklin* "left *Armijo* good law." Pet. 21

n.13. But the conflict described in the relevant citation, and resolved by *Shanklin,* had nothing to do with the question presented in the petition here. The conflict addressed in *Shanklin* was between courts holding that "federal funding of crossing improvement triggers pre-emption under FRSA" (such as the Tenth Circuit in *Armijo),* and courts holding that preemption does not occur until a representative of the federal government determines that the particular devices installed are adequate for safety (such as the Seventh Circuit in *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994)). *Shanklin*, 529 U.S. at 352. Of course, *Armijo* remains good law insofar as it consistent with *Shanklin*, but that does not mean that *Armijo* overrides *Shanklin*'s clear and repeated statements that preemption cannot occur absent full installation and operation.

In any event, *Armijo* does not conflict with the decision below. In *Armijo*, unlike here, the Secretary of Transportation had approved a project for crossbucks, without active devices, and the Tenth Circuit construed FHWA approval to mean that the passive devices were adequate. 87 F.3d at 1190-91. In other words, *Armijo* presented a *Shanklin*-type situation and had nothing to do with mid-project accidents. Thus, there is no post-*Shanklin* conflict.[2]

* * *

To sum up: The decision below is entirely consistent with this Court's precedents. The federal government recognized that to provide safety at the Hendricks Street

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[2]Petitioner also relies on *Hatfield v. Burlington N. R.R.*, 64 F.3d 559 (10th Cir. 1995), but that decision also predates *Shanklin.*

crossing both signs and flashing lights and gates were needed, and it approved an upgrade project requiring both. Tragically, this project was not completed until after the crash that took Rudy Kapitan's life. Petitioner wants to escape liability even though, at the time of the accident, the lights and gates had not been installed as called for by the FHWA-approved plan. Petitioner would thus have this Court construe the FRSA so that the public is protected by neither the devices the FHWA deemed appropriate for a crossing nor by state common law, no matter how long an upgrade project takes to complete. In any event, petitioner never proved that federal funds had actually been spent on that part of the upgrade project in place at the time of the accident, making the alleged conflict with pre-*Shanklin* cases from the Tenth Circuit illusory at best.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 01-1212

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILWAY CO.,
Petitioner,

v.

TAMERA LEE KAPITAN, Special Administratrix
of the Estate of RUDOLPH J. KAPITAN,
Respondent.

On Petition for a Writ of Certiorari to the Indiana Court of Appeals

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REPLY BRIEF OF PETITIONER

Petitioner Grand Trunk Western Railway Company's ("Grand Trunk") petition for certiorari presents a clear conflict between the Indiana Court of Appeals' decision and this Court's decisions in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000). The petition also poses a substantial and mature conflict among the circuits on an important question of federal law: namely, the timing of pre-emption in a mid-project crossing accident. This conflict undermines the explicit goal of the Federal Rail Safety Act of 1970 ("FRSA"), 49 U.S.C. § 20106, to promote "[n]ational uniformity" in rail safety rules and warrants resolution by this Court.

Respondent fails to refute either of these conclusions. First, respondent tries to distinguish this case from *Shanklin* by arguing that pre-emption did not occur here. To evade the application of pre-emption, respondent creates a new definition of federal-aid "participation." Respondent's argument founders, however, on the language and structure of the regulations, which establish that pre-emption had occurred here, as in *Shanklin*, prior to the accident.

Second, respondent illogically denies the existence of a circuit split by suggesting that the conflict might go away if the Court of Appeals for the Tenth Circuit were to overrule its precedent in light of *Shanklin*. Respondent's Brief in Opposition 8 ("Opp."). But that is wishful thinking. *Shanklin* did not address the issue of mid-project collisions and provides no basis for overruling prior precedent; the Tenth Circuit decisions in question postdate *Easterwood*, and *Shanklin* did not depart from *Easterwood*; and as demonstrated below, the Tenth Circuit's rule is the only one consistent with the plain language of the statute and regulations. The existence of a conflict among the circuits is

indisputable, and its resolution is necessary to implement the congressionally-mandated goal of uniformity in rail safety rules.

1. Respondent strains to avoid the conflict between the Indiana court's decision and this Court's holdings in *Easterwood* and *Shanklin*. In *Easterwood*, this Court held that "for projects in which federal funds participate in the installation of warning devices," pre-emption occurs. *Easterwood*, 507 U.S. at 671. *Shanklin* reaffirmed this rule and held that pre-emption in that case occurred when federal funds had participated in the installation of passive warning devices. *Shanklin*, 529 U.S. at 353-54. In the instant case, federally funded warning devices—stop signs, warning signs, and pavement markings—were installed, but the state court denied pre-emption. As argued in the petition, the decision below so clearly departs from the black-letter rule of law announced in *Easterwood* and *Shanklin* that it warrants summary reversal.

Respondent first mischaracterizes petitioner's argument as suggesting that there were two distinct projects at the crossing. Petitioner makes no such claim. Rather, petitioner relies on the fact that at the time of the accident the only devices at the crossing were federally funded, and therefore—under any view of *Easterwood* and *Shanklin*—the federal regulation on adequacy of devices (23 C.F.R. § 646.214) applied and pre-empted state law. As *Shanklin* holds, it is simply immaterial to pre-emption whether additional devices were necessary under federal law. 529 U.S. at 357-58; Petition for Certiorari 14-16 ("Pet."); see also *Bock* v. *St. Louis Southwestern Ry.*, 181 F.3d 920 (8th Cir. 1999) (finding pre-emption because of federally funded crossbucks, even though there had been no installation of subsequently required active devices), *cert. denied*, 529 U.S. 1086 (2000).

Respondent next attempts to distinguish this Court's precedents by redefining the moment when funds "participate" in the installation of devices. According to respondent,

the moment is when the final federal funds are "disbursed." Opp. 3. Respondent reasons that, since federal funds were disbursed after the passive devices in this case were installed, federal funds did not participate in their installation prior to the accident, and pre-emption would not apply.

Respondent's position is contrary to the entire statutory and regulatory scheme of federal highway funding. "Participation" is not synonymous with disbursement. Federal funds participate whenever reimbursable work is performed pursuant to an authorized federal-aid highway project (*i.e.*, one to which federal funds are obligated by an executed project agreement between the Federal Highway Administration ("FHWA") and the State).[1] The statute is explicit on this point: "[t]he execution of the project agreement [by the Secretary of Transportation] shall be deemed a contractual obligation of the Federal Government for the payment of the Federal share of the cost of the project." 23 U.S.C. § 106(a)(3).[2] As the FHWA has explained:

> An obligation is a commitment—the Federal government's promise to pay the States for the Federal share of a project's eligible cost. This commitment occurs when the project is approved and the project agreement is executed. Obligation is a key step in financing. *Obligated funds are considered "used" even though no cash is transferred.*

Federal Highway Admin., U.S. Dep't of Transp., *Financing Federal-Aid Highways* 16 (1999) (emphasis added, footnote

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[1] *See* Brief of the Association of American Railroads as *Amicus Curiae* in Support of the Petition 10-12 (describing the process for FHWA project authorization and agreement execution in rail-highway crossing improvement projects).

[2] The prior version of 23 U.S.C. § 106 included almost the same words: "[The Secretary's] approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." 23 U.S.C. § 106(a) (1997).

omitted). Courts have also recognized that federal funds are obligated as soon as the agreement is signed. See *Maine* v. *Goldschmidt*, 494 F. Supp. 93, 95 (D. Me. 1980); *Tennessee ex rel. Leech* v. *Dole*, 567 F. Supp. 704, 711 (M.D. Tenn. 1983) ("Obligation is the key step because obligated funds are considered 'expended' even though no cash is transferred."), *rev'd on other grounds*, 749 F.2d 331 (6th Cir. 1984).

The federal regulations on "participation" of federal funds in 23 C.F.R. parts 140 and 646 define the kinds of work compensable by the federal funds that are obligated after the project is authorized and the agreement executed. Under the regulations, "[t]he costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation." 23 C.F.R. § 646.216(e)(1); see also *id.* § 140.904(b). When any of that eligible work is in fact performed, federal funds participate in that work and in the costs incurred. See, *e.g.*, *id.* § 646.216(c)(3) (imposing limitations on railroad charges "[w]here Federal funds participate in the cost of replacement right-of-way"); *id.* § 646.216(b)(2) (describing conditions under which "Federal-aid funds may participate in the amounts paid to engineering consultants"); *id.* § 140.907(b) (rules for federal participation in overhead and indirect construction costs); *id.* § 140.801 ("reimbursement criteria for Federal participation in project related audit expenses").

Respondent's unsupported claim that federal funds "participate" in project work only when the project is fully completed and federal funds disbursed is inconsistent not only with the regulations but with the governing statute. 23 U.S.C. § 109(d) provides that:

> [o]n any highway project in which Federal funds hereafter participate, ... the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed

> or placed by any public authority or other agency, shall be subject to the approval of the State transportation department with the concurrence of the Secretary.

Obviously, the state agency and the Secretary do not exercise their approval authority only when the project is complete and funds already disbursed. Similarly, section 109(n) makes clear that federal-aid participation occurs during the course of the project, not after final payment is made; it provides that "any project for resurfacing, restoring, or rehabilitating any highway, other than a highway access to which is fully controlled, in which Federal funds participate shall be constructed in accordance with standards to preserve and extend the service life of highways and enhance highway safety." *Id.* § 109(n). Federal funds participate in any reimbursement-eligible work that is undertaken in an authorized federal-aid project.[3]

Thus, there can be no question of the meaning of the pre-emptive regulation in this case. That regulation establishes criteria for "[a]dequate warning devices" "on any project where Federal-aid funds participate in the installation of the devices," *i.e.*, where installation is performed on a project authorized by the FHWA for which a project agreement is executed. 23 C.F.R. § 646.214(b)(3)(i) (emphasis omitted). Federal funds participate in all phases of installation work: "preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation

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[3] The federal-aid highway program "is a reimbursable program," meaning that once federal funds are authorized for a project "the State can incur obligations, begin projects, and then later be reimbursed for the costs incurred." Federal Highway Admin., U.S. Dep't of Transp., *Financing Federal-Aid Highways* at 17. Respondent's argument would tie the regulations in an impossible knot by requiring that reimbursement be delivered before "participation" could occur, while the regulations provide that reimbursement is for costs in which federal funds participate. *See* 23 C.F.R. § 140.904(b).

improvement program and authorized by the FHWA are eligible for Federal-aid participation." *Id.* § 646.216(e)(1). Thus, the federal warning-device regulations are applicable from the beginning of an installation project, and "when they are applicable, state tort law is pre-empted." *Easterwood*, 507 U.S. at 670; *Shanklin*, 529 U.S. at 352. Federal funds participated in the installation of devices at the Hendricks Street crossing prior to the accident,[4] and hence any prior state-law duties that the railroad had to provide adequate warning devices were pre-empted.

Federal funds do not "participate in the installation of the devices" if no installation occurs, and in that event the federal warning-device regulation would not come into play and pre-emption would not occur. That is the lesson of *Easterwood*, in which an authorized grade crossing improvement project was "shelved," and the federally mandated warning devices were never installed at the crossing in question. The *Easterwood* Court found that pre-emption had not occurred. 507 U.S. at 672. But unlike *Easterwood*, in the Hendricks Street project the public authority had already installed the passive devices and was engaged (via the railroad contractor) in the installation of the active devices, and federal funds participated in the installation throughout. *Easterwood* does not stand for the nonsensical proposition that the federal regulation on the selection of warning devices does not apply until after the devices are "installed and operating"; it simply holds that pre-emption does not occur when the project does not involve the installation of warning devices.[5]

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[4] As noted in the petition, Pet. 18, federal funds in this type of project reimburse 90 percent of the State's total eligible costs for the project, and are not directly earmarked to the individual devices. 23 C.F.R. § 646.212(b)(3).

[5] The Indiana court's adoption of an "installed and operating" test is not only nonsensical, but it also collapses the distinction between the two kinds of federal-aid projects to which the federal warning-device regulation (23 C.F.R. § 646.214(b)(3) and (4)) applies. That regulation

Respondent's attempt to redefine participation thus cannot stand in light of the plain language and structure of the statute and regulations. Participation is not coterminous with reimbursement; funds participate in an installation prior to the actual disbursement of federal funds to the State. Installation occurred in this case pursuant to the federal-aid project, and federal funding participated in this installation. *Easterwood* and *Shanklin* hold that when this happens, pre-emption occurs. The conflict between the Indiana court's decision and this Court's decisions is patent.

Contrary to respondent's claims, this commonsense interpretation of pre-emption does not mean that the public is unprotected for the duration of the project, because the FHWA assumes authority over interim safety measures in a federally funded grade crossing improvement project. Pet. 21-22. Respondent objects to the petition's citation of a regulation providing that the "pertinent portions of the State-railroad agreement applicable to any protective services required during performance of the work must be included in the project specifications and special provisions for any construction contract." 23 C.F.R. § 646.216(e)(2)(iv), *quoted*

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applies "under 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices." *Id.* § 646.214(b)(3)(i). Subsection (b)(2) covers all federal highway projects that do not themselves involve the installation of devices, and provides that:

> where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for the construction of a new highway or the improvement of an existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

Id. § 646.214(b)(2). Under (b)(2), then, the FHWA evaluates existing devices for adequacy, and the adequacy rules of (b)(3) and (4) are sensibly applied to devices that are installed and operating. By contrast, for device-installation projects, the adequacy rules of (b)(3) and (4) are applied *prospectively* to govern the determination of which devices will be installed. Given this scheme, it makes no sense to hold that the regulation is not applicable (and thus not pre-emptive) until the devices are installed.

in Pet. 21-22. Respondent asserts that "services" are "labor" and therefore cannot be "interim protection." Opp. 7. This definition of "services" is unsupported by the regulations and contrary to its plain meaning. The regulation refers to "protective services" without qualification, whether they are supplied by human, mechanical, or other means. To be sure, protective services can be provided by labor, see *Thiele* v. *Norfolk & W. Ry.*, 68 F.3d 179, 184 (7th Cir. 1995) (noting the possible use of flagmen), but the regulation is not so limited. The FHWA has defined protective services costs to include broadly any "[e]xpenses incurred in the provision of safety to railroad and highway operations during the construction process." Federal Highway Admin., U.S. Dep't of Transp., *Railroad-Highway Grade Crossing Handbook* 188 (1986); *accord* 23 C.F.R. § 140.916. Not only is this definition broader than "labor," but also it is distinct from the definition of "Labor costs" in the same subpart. *Id.* § 140.906. Moreover, it would be bizarre to construe the FHWA's regulation to require disclosure of only labor services rather than the full range of protective services that are be employed to ensure rail and highway safety during the installation project. This regulation is itself pre-emptive of any state-law duties regarding warning devices during installation; once the FHWA has approved the protective services provisions of the agreement, the railroad is not at liberty to dictate the choice of different interim protective services, and therefore state law is pre-empted.[6] A railroad cannot be held liable for the federal government's decision.

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[6] Respondent also repeats the fact noted in the petition that the Code of Federal Regulations' incorporation of the U.S. Department of Transportation's *Manual on Uniform Traffic Control Devices for Streets and Highways* ("MUTCD") does not have pre-emptive effect. Pet. 15 n.10; Opp. 7. The Petition refers to the MUTCD not as a source of pre-emption but as a classification of stop signs as interim safety devices that must be authorized before installation. Pet. 22.

2. Respondent incredibly denies the existing circuit split on the basis of respondent's assertion that the Tenth Circuit should change its position and overrule its precedent. Opp. 8. Of course any circuit split might be eliminated if certain courts were to overrule their precedents, but idle speculation on such an occurrence is immaterial. The Tenth Circuit's decisions are in undeniable conflict with this case and with other federal circuits on the timing of pre-emption. The Tenth Circuit held in *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996), and *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559 (10th Cir. 1995) (mid-project crossing accident), that pre-emption is triggered at the beginning of a federal-aid railroad project, when the decisionmaking authority of the railroad ends. The Indiana court in this case joined several federal courts of appeals in determining the opposite, that pre-emption occurs at the end of the project. See *Thiele*, 68 F.3d at 184; *St. Louis Southwestern Ry.* v. *Malone Freight Lines, Inc.*, 39 F.3d 864, 867 (8th Cir. 1994); see also *Akin* v. *Missouri Pac. R.R.*, 977 P.2d 1040, 1052-53 (Okla. 1998). The Tenth Circuit decisions are still the law of that circuit, and in no way were they overruled by *Shanklin*, which did not decide the issue of pre-emption in mid-project collisions. Moreover, as previously noted, the Tenth Circuit decisions alone are consistent with *Easterwood* and the plain meaning of the statute and regulations addressing federal-aid participation in highway projects.

In contravention of the FRSA policy of nationally uniform safety laws, this split imposes different requirements on railroads depending on the location of the tracks. Furthermore, all railroads that operate in Indiana are unsure of their duties and unable to rely on the prioritization and selection rules of the Section 130 program. See 23 U.S.C. § 130. Nor are railroads able to rely on the clear rule of *Easterwood* and *Shanklin* that pre-emption applies when federal funds participate in the installation of devices. The obvious variations in duties applicable to railroads in different

jurisdictions illustrate vividly the impact of this circuit split. Even within a single jurisdiction, federal law is indeterminate; under *Akin* the supreme court in Oklahoma (an important railroad state with three Class I railroads and twelve other railroads) applies a different pre-emption rule from the Tenth Circuit's *Armijo/Hatfield* standard, an untenable situation which can only foster forum shopping. It is critical for this Court to resolve this conflict.

In summary, the Indiana court impermissibly disregarded the fact that the warning devices at the Hendricks Street crossing at the time of the accident were installed with federal funds and governed by 23 C.F.R. § 646.214(b)(3) and (4). Under any reading of *Easterwood* and *Shanklin*, state tort law duties imposed upon the railroad regarding the selection of devices are pre-empted, and the decision below should be summarily reversed. Even if this Court were not to grant summary reversal on the basis of the federal funding of the installed passive devices, it should resolve the mature division among the courts on a question of national importance, that of pre-emption timing. This Court's review is all the more imperative when the rule adopted by the Indiana court undermines the national uniformity that Congress ordered in the FRSA; conflicts with the plain meaning of the regulations; and arises from an unwarranted interpretation of *Shanklin* that only this Court can correct.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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